

(26,950)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 864.

CREAM OF WHEAT COMPANY, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF GRAND FORKS, IN THE STATE OF
NORTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
NORTH DAKOTA.

INDEX.

	Original. Print	
Transcript of record from the District Court of Grand Forks		
County.....	1	1
Clerk's certificate to judgment-roll.....	1	1
Notice of appeal and specifications of error.....	2	2
Summons and service.....	9	5
Amended complaint.....	10	6
Answer.....	15	8
Notice to produce evidence.....	26	16
Plaintiff's proposed findings and conclusions.....	28	17
Defendant's proposed findings of fact and conclusions of law and order for judgment.....	35	21
Memorandum opinion, Cooley, J.....	42	25
Findings of fact, conclusions of law, and order for judgment	58	38
Statement of costs.....	68	45
Judgment.....	69	46

	Original.	Print
Statement of the case.....	72	48
Judge's certificate.....	73	48
Stipulation to settle record.....	75	49
Summary of exhibits.....	76	50
Questions of fact to be reviewed on appeal.....	79	51
Offers of evidence, colloquy, &c.....	82	52
Testimony of W. H. Alexander.....	96	60
Testimony of M. J. Londergan.....	111	71
Motion to dismiss.....	129	83
Testimony of Rome G. Brown.....	132	84
Testimony of Hans Anderson.....	146	93
Stipulation as to pleadings.....	158	98
Testimony of Rome G. Brown (recalled).....	158	99
Motion to dismiss.....	161	100
Stenographer's certificate.....	168	103
Assessment lists.....	169	103
Plaintiff's Exhibit 1—Assessment-roll.....	175	103
Plaintiff's Exhibits 2 and 3—Personal property assess- ment for the year 1919.....	176	103
Plaintiff's Exhibit 4—Certificate of city auditor.....	178	104
5—Certificate of city assessor....	179	104
6—Certificate of city auditor....	180	105
7—Certificate of city assessor....	181	105
10—Protest.....	182	105
11—Tax list of personal property..	183	106
12—Tax list of personal property..	183½	106
14—Protest.....	184	107
Defendant's Exhibit A—Certificate of Secretary of State authorizing Cream of Wheat Co. to do business in North Dakota.....	186	108
Defendant's Exhibit B—Statements.....	187	108
Excerpt from respondent's brief, &c.....	194	111
Opinion, Christianson, J.....	196	112
Opinion, Robinson, J., dissenting.....	207	119
Order for judgment.....	211	121
Judgment.....	214	122
Petition for writ of error.....	216	123
Order allowing writ of error.....	219	125
Writ of error.....	221	126
Citation and service.....	224	127
Assignments of error.....	226	128
Bond on writ of error.....	230	130
Clerk's return to writ of error.....	235	133

STATE OF NORTH DAKOTA,
County of Grand Forks:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a Municipal Corporation, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Certificate of Clerk to Judgment Roll.

I, M. W. Spaulding, Clerk of the District Court of the County of Grand Forks, First Judicial District, State of North Dakota, do hereby certify that the papers hereto attached constitute the original Notice of Appeal in the above entitled action, and the judgment roll herein and the whole thereof, to-wit: Summons and Complaint with admission of service thereon, Amended Complaint, Answer, Notice to Produce, Plaintiff's proposed Findings, Defendant's proposed Findings, Memorandum Opinion, Findings of Fact, Conclusions of Law and Order for Judgment, Bill of Costs and Disbursements, Judgment, Statement of the Case including originals of Plaintiff's Exhibits 10 and 14, and Defendant's Exhibit B, and copies of Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 11 and 12, and Defendant's Exhibit A, Defendant's Exhibits 8, 9, and 13 being fully quoted and set out in the statement of the case.

This certificate is attached to said papers and they are hereby transmitted to the Supreme Court of the State of North Dakota, pursuant to the appeal taken therein.

Dated this 12th day of January, 1918.

[Seal of District Court, County of Grand Forks, State of North Dakota.]

M. W. SPAULDING,
Clerk of said Court.

STATE OF NORTH DAKOTA,
County of Grand Forks, ss:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a Municipal Corporation, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Notice of Appeal.

To the above-named defendant and to Messrs. Brown & Guesmer and Messrs. Murphy & Toner, attorneys for defendant:

You will please take notice that the plaintiff in the above entitled action appeals to the Supreme Court of the State of North Dakota from that certain Judgment entered therein by the Clerk of the District Court of Grand Forks County, North Dakota, on November 6th, 1917. That such appeal is on both questions of law and fact, more specifically enumerated as follows, to-wit:

Specifications of Error of Law.

1. The Court erred to plaintiff's prejudice in finding as a matter of law as follows:

"That at no time during any of the period from 1908 to 1914, both inclusive, did the defendant have, nor has it at any time since had, any property of any kind, nature or description subject to assessment and taxation within the State of North Dakota."

3 2. The Court erred to plaintiff's prejudice in finding as a matter of law as follows:

"That each and all of the pretended assessments and taxes involved in this action are illegal, null and void, and that defendant is entitled to judgment declaring the same to be illegal, null and void, and directing that the same be stricken and cancelled from the records of the city and county of Grand Forks; that plaintiff is not entitled to recover anything in this action, and that defendant is entitled to judgment against plaintiff for its costs and disbursements herein."

3. The Court erred to plaintiff's prejudice in ordering judgment in accordance with the Findings of Fact and Conclusions of Law, against the plaintiff in favor of the defendant.

Specifications of Errors of Fact Where the Evidence Was Insufficient to Sustain the Findings of Fact.

1. The Court erred in finding as a fact the following: "That in neither nor any of the years 1908, 1909, 1910, 1911, 1912 or 1913

was any property of the defendant assessed or attempted to be assessed for taxation, or taxed, in the State of North Dakota."

It was conclusively shown by Finding No. 5 to the contrary. It was otherwise conclusively shown by plaintiff's Exhibits 1 to 14, inclusive. It was otherwise conclusively shown by the testimony of the witness, W. H. Alexander, beginning at page 16 of the Statement of Case, and by the testimony of the witness, M. J. Londergan, beginning at page 32 of such Statement of Case and by the testimony of the witness, Hans Anderson, beginning at page 68 of such Statement of Case. There is no evidence whatever to sustain this finding.

2. The Court erred in finding as a fact, "That each and all of such pretended assessments for such years, so placed upon the assessment roll of said city assessor, were made by the Tax Commission of North Dakota, acting through said city assessor, and were directly made by said Tax Commission."

It was otherwise conclusively shown by the testimony of witness, M. J. Londergan, beginning at page 32, and also on pages 42 and 43 of the Statement of Case. There was no evidence whatever to sustain this finding. The finding is contradictory within itself.

3. The Court erred in finding as a fact that, "The alleged property, which was attempted to be assessed by said pretended assessments so placed in said county auditor's book, or assessment roll, had not ever been omitted in the assessment of any previous year or years."

Plaintiff's Exhibit No. 9, being the record of the county board of equalization, shows that the property of defendant had not been taxed. Plaintiff's Exhibit No. 12 shows an assessment against the defendant for the years 1908 to 1913, inclusive. No objection was made that it was a double assessment. Neither was it pointed out that such property had not escaped taxation for such years. Paragraph 5 of the Complaint is a resolution of the board of county commissioners reciting that such property had escaped taxation for the years 1908 to 1913 inclusive. The resolution was introduced by stipulation at page 15 of the Statement of Case and it is undisputed. Defendant claims that they had no property in the State during the years in question.

Plaintiff's Exhibit No. 13 is a protest on the part of the defendant against its assessment of taxes for the years 1908 to 1914, inclusive, showing that the same had escaped taxation for the years 1908 to 1913, inclusive. The case was tried throughout on the theory that the defendant had not been taxed for the years in question and the same was conceded in open court by counsel, as shown at page 47 of the Statement of Case. The testimony of the witness, Hans Anderson, at page 76 of the Statement of Case shows that there had been no assessment against the defendant for the years 1908 to 1913, inclusive.

4. The Court erred in finding as a fact, "That each and all of such pretended assessments for the years 1908 to 1913, both inclusive, so placed in said county auditor's book, or assessment roll of property which had escaped taxation, were made by the Tax Commission of

North Dakota, acting through said county auditor, and were directly made by said Tax Commission."

It was otherwise conclusively shown in the testimony of the witness, Hans Anderson, county auditor, beginning at page 68 of the Statement of Case, and particularly at pages 71, 72, 73, 74 and 75. To the same effect is the testimony of the witness, Londergan, the City assessor at page 47 of the Statement of Case. No testimony was offered by defendant on this point. There is absolutely no evidence to support this finding.

5. The Court erred in finding as a fact, "That during all of said times all of defendant's property of every kind and description was permanently located beyond the borders of the State of North Dakota."

This is a question of law rather than one of fact and opens up the question of situs. The evidence showed that the tangible property of defendant was located beyond the borders of North Dakota, but no evidence was offered to prove as a question of fact that the
6 situs was located outside of North Dakota. The facts conclusively establish that defendant is a domestic corporation and holds the stockholders' meetings in the City of Grand Forks and maintains its office there. The testimony of the witness, Brown, at page 56 of the State- of Case proves the point and it is admitted by the plaintiff. Defendant admitted at page 2 of the Statement of Case that the assessment was under Section 2110 of the Compiled Laws of 1913, which section designates the assessment as "stocks or bonds."

6. The Court erred in finding as a fact, "That at no time during any of the years 1908 to 1914, both inclusive, did defendant own any bonds or stocks of any kind."

Section 2110, Compiled Laws 1913, designates defendant's franchise to exist, after making certain calculations, to be "bonds or stocks." This too is a question of law and not a question of fact. The facts conclusively establish that defendant is a domestic corporation. This is proven by the testimony of the witness, Brown, at page 56 of the Statement. It was established as a fact that both prior to the commencement of the action and during the progress of the trial upon demand of plaintiff, defendant refused to disclose the figures contemplated by Section 2110, C. L. 1913. This is in evidence as a written demand in the exhibits of the Statement of Case and refusal is found in the testimony of the witness, Brown, at page 49 of the Statement. The defendant admitted at page 2 of the Statement of Case that the assessment was made under Section 2110, which section designates the assessment as "stocks or bonds." Both parties tried the case on the theory that the tax, if any, must be sustained under that section.

7 and all of the pretended assessments and taxes involved in this action were attempted to be assessed and imposed solely under the provisions of Section 2110, Compiled Laws of North Dakota for 1913, and upon defendant's own capital stock on account of the alleged value of defendant's intangible property."

This is a question of law and not one of fact. It is contradictory within itself. An assessment under Section 2110 is not an assessment of capital stock. No evidence whatever was or could be introduced to sustain this finding so far as the capital stock assessment is concerned. The plaintiff does not except as to the first part of the finding and concedes the same to be true, but does except as to the latter part thereof with reference to the assessment of defendant's own capital stock.

Dated this 4th day of January, 1918.

GEO. E. WALLACE,
O. B. BURTNESSE,
THEO. B. ELTON,
Attorneys for Plaintiff.

Endorsed as follows: Original. State of North Dakota, County of Grand Forks. In Dist. Court. Grand Forks Co., Plaintiff, vs. Cream of Wheat Co., Defendant. McIntyre & Burtness, Attorneys for —, Grand Forks, N. Dak. Due and personal service of the within Notice of Appeal is hereby admitted this 9th day of January 1918, at Grand Forks. Brown & Guesmer and Harry S. Carson & Murphy & Toner, Attorneys for Defendant.

STATE OF NORTH DAKOTA,
County of Grand Forks:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff,

VS.

CREAM OF WHEAT COMPANY, a Corporation.

Summons.

The State of North Dakota to the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer upon the subscribers within thirty days after the service of this summons upon you exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated this 22nd day of April, 1916.

GEO. E. WALLACE,
O. B. BURTNESSE,
State's Attorney, Grand Forks County, North Dakota,
Attorneys for Plaintiff.

Due and personal service of the within summons is hereby admitted this 22nd day of April, 1916, at Grand Forks, N. Dak., by receipt of a true copy thereof.

MURPHY & TONER,
Attorneys for Defendant.

10 STATE OF NORTH DAKOTA,
County of Grand Forks, ss:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff,

VS.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Amended Complaint.

Plaintiff for its cause of action herein against the defendant alleges as follows:

1. That the plaintiff is and at all of the times hereinafter mentioned was a municipal corporation organized under and by virtue of the laws of the state of North Dakota.

2. That the defendant is and at all of the times hereinafter mentioned was a corporation organized under and by virtue of the laws of the state of North Dakota, with its principal place of business at the city of Grand Forks, in the County of Grand Forks, State of North Dakota.

3. That the county auditor of said plaintiff, Grand Forks County during the year of 1914, acting under the supervision of the Tax Commission of the State of North Dakota, duly assessed certain personal property situate in the City of Grand Forks, County of Grand Forks, North Dakota, to-wit: "Bonds and Stocks" for the years 1908, 1909, 1910, 1911, 1912 and 1913 as property having escaped taxation; that all of such personal property was then and there and had during each of said years, been the property of the defendant and had not been assessed or taxed during any of such years; that during the year 1914 the city assessor of the city of Grand Forks, acting under the instructions and requirements of the Tax Commission of the State of North Dakota, likewise duly assessed the said personal property, to wit: "Bonds and Stocks" of the defendant company for the years 1908, 1909, 1910, 1911, 1912 and 1913 as property

11 having escaped taxation during such years; that thereafter such assessment as made by said city assessor was duly reviewed and equalized by the Board of Equalization of the City of Grand Forks; that thereafter the said assessments so made as aforesaid by the county auditor of Grand Forks County and the city assessor of Grand Forks City were duly equalized by the Board of Equalization of said plaintiff county and merged as one assessment that thereafter such assessment, merged as aforesaid, was duly equalized.

ized and reviewed by the State Board of Equalization; that thereafter the county auditor of said Grand Forks County duly entered and extended upon the tax lists of said county against the personal property of the defendant so assessed as aforesaid taxes for each of said years at the same rate and for all the purposes for which taxes were levied upon property in said Grand Forks County in each of said years in the sums following:

For the year 1908	the sum of	.....	\$3,094.00
" " " 1909	" " "	.....	3,045.00
" " " 1910	" " "	.....	2,795.00
" " " 1911	" " "	.....	3,980.00
" " " 1912	" " "	.....	3,094.00
" " " 1913	" " "	.....	3,155.00

4. That the city assessor of the City of Grand Forks, County of Grand Forks, State of North Dakota, during the year 1914 duly assessed for the year 1914 certain personal property belonging to defendant situate in said city of Grand Forks, County of Grand Forks, State of North Dakota, to-wit: "Bonds and Stocks"; that thereafter such assessment was duly reviewed and equalized as provided by law and that thereafter the county auditor of said Grand Forks County duly entered and extended upon the tax lists of said County against the said property of said defendant taxes for said year of 1914 in the sum of \$3,180; that such taxes became delinquent on March 1st, 1915, and that no part thereof has been paid.

12 5. That thereafter and on or about the first day of February, 1916, the Board of County Commissioners of said Grand Forks County, North Dakota, passed and adopted a Resolution as follows:

"Whereas, Personal property of the Cream of Wheat Company, a corporation, has been duly assessed for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, and whereas the said Cream of Wheat Company, a corporation, has failed and neglected to pay said taxes for such years, and whereas there is now due and owing to the County of Grand Forks for such taxes levied and assessed for the year 1908 the sum of \$3,094.00 together with accrued interest and penalty thereon, for the year 1909 the sum of \$3,045.00 together with accrued interest and penalty thereon, for the year 1910 the sum of \$2,795.00 together with accrued interest and penalty thereon, for the year 1911 the sum of \$3,980.00 together with accrued interest and penalty thereon, for the year 1912 the sum of \$3,094.00 together with accrued interest and penalty thereon, for the year 1913 the sum of \$3,155.00 together with accrued interest and penalty thereon and for the year 1914 the sum of \$3,180.00 together with accrued interest and penalty thereon, and whereas all of such personal property taxes are now delinquent, and whereas the said Cream of Wheat Company, a corporation, does not seem to have tangible property within the State of North Dakota subject to distress and sale, and that it is therefore deemed expedient by the Board of County Commissioners of Grand Forks County to collect such delinquent taxes by action.

Now, therefore, be it resolved, That an action be instituted in the name of Grand Forks County for and on behalf of said county for the collection of all of the saforesaid delinquent personal property taxes together with all penalty and interest thereon that will accrue up to the time of the determination of said action, and that the state's attorney of this county be hereby authorized and instructed to commence such action or actions as he may deem fit for the collection of such taxes in the name and on behalf of said county.

Wherefore, Plaintiff prays judgment in its favor and against the defendant for the sum of Twenty Two Thousand Three Hundred Forty Three Dollars (\$22,343.00) together with interest and penalty thereon from and after March 1, 1915, as provided by law, and for the costs and disbursements of this action.

GEO. E. WALLACE,
O. B. BURTNESSE,
THEO. B. ELTON,

*State's Attorney, Grand Forks Co., N. D.,
Attorneys for Plaintiff.*

14 Endorsed as follows: 9270. Original. State of North Dakota, County of Grand Forks. In District Court. County of Grand Forks, etc., plaintiff, vs. Cream of Wheat Company, etc., defendant. Complaint. McIntyre & Burtness, attorneys for plaintiff, Grand Forks, N. Dak. Due and personal service of the within — is hereby admitted this — day of —, 19—, at —. — —, attorneys for —. Filed in the office of the clerk of the District Court, Grand Forks Co., State of North Dakota, at — o'clock — M. Mar. 20, 1917. M. W. Spaulding, Clerk, by — —, deputy.

15 STATE OF NORTH DAKOTA.
County of Grand Forks:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Answer.

Defendant for its answer to the complaint in the above entitled action, and to each and all of the causes of action therein, alleges as follows:

I.

Defendant denies each and every allegation, matter and thing in said complaint contained except as is hereinafter expressly admitted.

II.

Defendant admits that plaintiff is and was a municipal corporation alleged in paragraph 1 of the complaint.

III.

Defendant admits that defendant is, and during all the times mentioned in the complaint has been, a corporation organized and existing under the laws of North Dakota, and defendant alleges that it keeps and kept and maintained continuously a public office in the City of Grand Forks in said State for the transaction of its usual and corporate business.

IV.

Defendant admits that certain pretended assessments for the years 1908, 1909, 1910, 1911, 1912 and 1913, and also 1914 were attempted to be made against defendant during the year 1914, and admits that said pretended assessments were designated "bonds and stocks"; but defendant specifically denies that any of said pretended assessments were made by the County Auditor of the Plaintiff County, and defendant alleges that said pretended assessments were attempted to be made by the Tax Commission of North Dakota acting through the City Assessor of the City of Grand Forks; and defendant admits that certain pretended taxes were thereafter attempted to be entered and extended against defendant on the tax lists on account of said pretended assessments and defendant admits that it has not paid any of said attempted taxes.

V.

Defendant admits that the Board of County Commissioners of said plaintiff County attempted to pass and adopt a pretended resolution substantially in form as set forth in paragraph 5 of the complaint, but defendant alleges that said pretended resolution was attempted to be passed and adopted on February 2, 1916.

VI.

Defendant alleges that when the matter of said pretended assessments, thus made by said tax commission acting through said City Assessor, for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 came before the Board of Equalization of the City of Grand Forks, and again when it came before the Board of Equalization of the County of Grand Forks, the defendant filed with each of said Boards objections and protests to each and all of said pretended assessments hereinbefore in this paragraph mentioned, and that said Boards of Equalization, and each of them, did not investigate or ascertain the facts in reference to said matters, but arbitrarily and without just cause disregarded said protests and objections; and defendant alleges

that it did not until long after said Boards adjourned have any knowledge or notice of any action by the County Auditor of said County, and defendant alleges on information and belief that at the time of the filing of said objections and protests said Auditor had not taken any of the action now claimed by plaintiff to have been taken by him in any attempted assessment or assessments by plaintiff claimed to have been made by him against defendant.

17

VII.

Further answering, defendant alleges that its business is now, and during all of 1908, 1909, 1910, 1911, 1912, 1913 and 1914 was, the manufacture and sale of a breakfast food known as "Cream of Wheat";

That prior to 1908 it duly complied with the laws of Minnesota relating to foreign corporations, and obtained a license to transact business in the State of Minnesota and that it thereupon established and has since continuously maintained and operated a factory for the manufacture of, and a sales office for the sale of, said product known as "Cream of Wheat" in the city of Minneapolis, Hennepin County, Minnesota; and defendant alleges that at all times during the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 it maintained no factories or sales offices other than the factory and sales office in said City of Minneapolis; and that at all times during the said years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 its said product "Cream of Wheat," thus manufactured at Minneapolis was sold extensively throughout the United States and various foreign countries; that at all times during said years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 all orders for said product thus sold throughout the United States and various foreign countries were received by and filled through the said Minneapolis factory and office of the defendant, and that for convenience and economy in distribution, defendant, to fill orders, stored considerable quantities of said product in various cities in the United States and foreign countries;

And defendant alleges that it has not now and has not had at any time during the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 any property of any kind, either tangible or intangible or otherwise, within said City of Grand Forks or said County of Grand Forks or said State of North Dakota and that it has not now and did not have at any time at, or since the time of the pretended assessments in-

18

volved in the present action, any property available or remaining within North Dakota taxing jurisdictions, and defendant alleges that it was not subject to taxation of any kind by said City of Grand Forks or said County of Grand Forks, or said State of North Dakota for any of the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914.

VIII.

Further answering, defendant alleges that at all times during the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 it was subjected

taxation upon all of its property in the places where it had such property, to-wit, at Minneapolis, Hennepin County, Minnesota and at other cities in the United States and in foreign countries, and that it is now and was during all of said years 1908, 1909, 1910, 1911, 1912, 1913, and 1914, heavily taxed upon all of its property, and that if the pretended taxes or assessments involved in this action, or any of them, are sustained, it would constitute the placing upon said defendant of double taxation and double burden and subject it to an unjust charge.

IX.

Further answering, defendant alleges that if the pretended assessments or taxes, or any of them, involved in the present action are sustained, it would impose upon defendant a contribution toward the expenses of the Municipal, County and State Governments of said City of Grand Forks and said County of Grand Forks and State of North Dakota without the entailing by said Cream of Wheat Company upon said Governments of any part of such expense, and would constitute a singling out of said Cream of Wheat Company and the placing of a burden upon it which is not placed against corporations similarly situated.

X.

Further answering, defendant alleges that at no time during the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 did it own any "bonds or stocks" of any kind;

That if any of the pretended assessments and taxes involved in the present action were intended and attempted to be made as assessments and taxes on any intangible value of property, each and all of said pretended assessments and taxes involved in this action are illegal and null and void because defendant, not having any tangible property within said State of North Dakota, could not be assessed and taxed there on intangible property;

That each and all of said pretended assessments and taxes, involved in this action, if intended as assessments and taxes on a claimed intangible value or property, are illegal and null and void because not assessed in accordance with the procedure prescribed by the Statutes of North Dakota, in this, that Section 2110 of the Compiled Laws of North Dakota for 1913 provided in part as follows:

"In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain."

And defendant alleges that said Section 2110 of the Compiled Laws of North Dakota for 1913 further required that the assessing officials, after making out the special statement just mentioned, should place the net amount arrived at in subdivision 23 of the general list pro-

vided for by Section 2103 of the Compiled Laws of North Dakota for 1913;

And defendant alleges that in the case of each and all of the pretended assessments and taxes involved in the present case, there was not made out any statement as provided for by said Section 2110, nor were any of the steps and proceedings required by said Section taken, and the amount of the pretended assessments was not placed in Subdivision 23 of the General list provided for by Section 2103 of the Compiled Laws of North Dakota for 1913, and no notice was given to defendant of any attempt to assess or tax it on or for any claimed intangible value or property, if such was in fact the intention of the assessing officials; and defendant alleges that if in and by any of said attempted assessments and tax, involved in this action,

an assessment and tax is sought to be imposed against this defendant on any intangible value or property, then the action of said officials is an attempt to deprive this defendant of its property without due process of law, and if said steps by said officials are held to constitute a compliance with said Sections 2103 and 2110 then said Sections are in conflict with the Constitution of the United States and of the State of North Dakota in that they deprive this defendant of its property without due process of law; and this defendant alleges that in that event said actions of said taxing officials and said Sections 2103 and 2110 are in conflict with Section 1 of Article 14 of the Amendments of the Constitution of the United States and Subdivision 13 of Article 1 of the Constitution of the State of North Dakota, and are therefore void.

XI.

Further answering, defendant alleges that the "personal property assessment book number 4 for 1914, City of Grand Forks," in which each and all the pretended assessments for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 appear, was not verified by the affidavit of the City Assessor, as required by law, and defendant alleges on information and belief that said book was not in fact sworn to by said City Assessor as required by law; and defendant alleges that by reason of said facts, each and all of said pretended assessments and taxes are illegal and null and void.

XII.

Further answering, defendant alleges that each and all of the pretended assessments and taxes for the years 1908, 1909, 1910, 1911, 1912 and 1913 were attempted to be made by the Tax Commission of North Dakota acting through said City Assessor and under Subdivision 19 of Section 9 of Chapter 303 of the Laws of North Dakota for 1911, which Subdivision 19 provides that it shall be the duty of said Tax Commission and it shall have power and authority

"To require local assessors to place upon the assessment rolls property which may have escaped taxation during the previous six years.

are available and remaining within the taxing jurisdiction."

Defendant alleges that each and all of said pretended assessments for the years 1908, 1909, 1910, 1911, 1912 and 1913 were direct assessments by said Tax Commission and as such in violation of Article 10 and Section 176 and Section 179 and the 4th Amendment to the Constitution of the State of North Dakota, and defendant alleges that by reason of said facts each and all of said pretended assessments and taxes for the years 1908, 1909, 1910, 1911, 1912, and 1913 are illegal and null and void, and defendant alleges that said tax commission had no authority to make any assessments and that all the alleged assessments and taxes involved in this action, through whomsoever made, are illegal and in contravention of said constitutional provisions.

XIII.

Further answering, defendant alleges that each and all of the pretended assessments and taxes for the years 1908, 1909, 1910, 1911, 1912 and 1913 were attempted to be made by the Tax Commission of North Dakota acting through said city assessor and under Subdivision 19 of Section 9 of Chapter 303 of the Laws of North Dakota for 1911, which Subdivision 19 provides that it shall be the duty of said Tax Commission and it shall have power and authority

"To require local assessors to place upon the assessment rolls property which may have escaped taxation during the previous six years, and are available and remaining within the taxing jurisdiction."

Defendant alleges that the Law of North Dakota, subdivision 19 above quoted, is confined and limited to tangible property actually available and remaining within the taxing jurisdiction, and that, as hereinbefore alleged, defendant did not at any time during any of said years, 1908, 1909, 1910, 1911, 1912, 1913 and 1914, have, nor has it had since said years, nor has it now, any property, tangible or intangible, within any North Dakota taxing jurisdictions, and that by reason of said facts, each and all of said pretended assessments and taxes for the years 1908, 1909, 1910, 1911, 1912 and 1913 through whomsoever made are illegal and null and void.

XIV.

Further answering, defendant alleges that each and all of the pretended assessments and taxes for the years 1908, 1909, 1910, 1911, 1912 and 1913 were attempted to be made by the Tax Commission of North Dakota acting through said City Assessor and under Subdivision 19 of Section 9 of Chapter 303 of the Laws of North Dakota for 1911, which Subdivision 19 provides that it shall be the duty of said Tax Commission and it shall have power and authority

"To require local assessors to place upon the assessment rolls property which may have escaped taxation during the previous six years, and are available and remaining within the taxing jurisdiction." •

Defendant alleges that said Chapter 303 of the Laws of North Dakota for 1911 was approved March 17th, 1911 and that said Law, insofar as it attempts to authorize the placing upon the assessment roll property claimed to have escaped taxation during years prior to the time of the passage of said law is retroactive and unconstitutional and defendant alleges that if the contention of plaintiff in these proceedings is upheld by final judgment in this case against defendant for any amount whatever for said pretended assessments and taxes through whomsoever made, for the years 1908, 1909, and 1910, for any of said years, that such judgment would be an enforcement of a Statute and Law of the State of North Dakota, and particularly that certain Statute and Law above specified and that, as construed the said Law and the enforcement thereof would be retroactive and unconstitutional; and that said Statute and Law of the State of North Dakota, as so construed, would be and is repugnant to the Constitution of the United States, and particularly to Section 9 of Article I of the Constitution of the United States; and defendant also alleges that said Statute and Law of the State of North Dakota, as so construed, would be and is repugnant to the Constitution of the State of North Dakota, and particularly to Section 16 of Article 1 of said Constitution of the State of North Dakota.

22

XV.

Further answering, defendant alleges that said City of Grand Forks, County of Grand Forks and State of North Dakota are attempting to assess taxes against other persons and corporations residing or located in said state, when said persons or corporations have no property therein; that said action on the part of the taxing officials was taken arbitrarily and capriciously without any inquiry into the facts for the purpose of exacting payments from this defendant, under the guise of taxes, and said action was taken in discrimination against this defendant; and this defendant alleges that all the attempted assessments and taxes involved in this action are unlawful, unfair and unequal; and said attempted assessments and taxes are attempted to be placed and enforced against this defendant in denial to it of equal protection of the laws and constitute a denial to it of equal protection of the laws, in violation of the Constitution of the United States, being Section 1 of Article 14 of the amendments to said Constitution.

XVI.

Further answering, defendant alleges that each and all of the pretended assessments and taxes involved in the present case were attempted to be made and entered without due notice or opportunity to defendant to be heard to try the questions as to the validity and fairness of the same; that the Assessment and Tax Laws of the State of North Dakota, under which each and all of the pretended assessments and taxes involved in the present action were attempted to

made and entered, are unconstitutional in that they provide for the taking of property without due process of law in this; that the defendant was not afforded any or sufficient notice or opportunity to be heard before the taxing and assessing officers and boards, or any other tribunal; and that said laws are further unconstitutional and void for the reason that no appeal from the rulings and decisions of the taxing and assessing officers and board with reference to the assessment and taxation of property is provided for and no opportunity or provision is given or made for the trial and determination of the questions above referred to in any court; and defendant alleges that if the contention of the plaintiff in these proceedings is upheld by a final judgment in this case against Defendant for any amount whatever, such judgment would be an enforcement of the Statutes and Laws of the State of North Dakota and that as construed the said Laws and the said enforcement thereof would have the effect to deprive the defendant of its property without due process of law; and that said Statutes and Laws of the State of North Dakota, as so construed, would be and are repugnant to the Constitution of the United States and particularly to Section 1 of Article 14 of the Amendment thereto; and Defendant alleges that said Statutes and Laws of the State of North Dakota, as so construed, would be and are repugnant to the Constitution of the State of North Dakota and particularly to Subdivision 13 of Article 1 of said Constitution of the State of North Dakota.

Wherefore, defendant demands judgment that plaintiff take nothing by this action and that said attempted assessments and taxes be stricken from the records of said City and County, and that it have judgment against plaintiff for its costs and disbursements herein.

Dated May 23rd, 1916.

MURPHY & TONER,
Grand Forks, North Dakota, and
BROWN & GUESMER,
1000 Metropolitan Life Bldg., Minneapolis, Minnesota,
Attorneys for Defendant.

24 STATE OF MINNESOTA,
County of Hennepin, ss:

Emery Mapes, being first duly sworn, says that he is the Secretary of the Cream of Wheat Company, the defendant in the above entitled action; that he has read the foregoing answer and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and that as to such matters he believes the same to be true.

EMERY MAPES.

Subscribed and sworn to before me this 23rd day of May, 1916.

[NOTARIAL SEAL.]

HARRY S. CARSON,

Notary Public, Hennepin County, Minn.

My Commission expires August 20, 1919.

Due and personal service of the within answer, by receipt of copy thereof is hereby admitted this 19th day of June, 1916.

McINTYRE & BURTNESS,

Attorneys for Plaintiff.

25 Endorsed as follows: #9270. Filed in the office of the Clerk of the District Court, Grand Forks Co., State of North Dakota, at 4 o'clock P. M., Mar. 28, 1917. M. W. Spaulding, Clerk by ———, Deputy. Original. State of North Dakota, County of Grand Forks. In District Court, First Judicial District. County of Grand Forks, in the State of North Dakota, a Municipal Corporation Plaintiff, vs. Cream of Wheat Company, a Corporation, Defendant. Answer. Murphy & Toner, Grand Forks, N. D., and Brown & Guesmer, 1000 Metropolitan Life Bldg., Minneapolis, Minnesota, Attorneys for Defendant. #9270.

26 STATE OF NORTH DAKOTA,
 County of Grand Forks, ss:

In District Court, First Judicial District.

THE COUNTY OF GRAND FORKS, STATE OF NORTH DAKOTA, a Municipal Corporation, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Notice to Produce.

To the above-named Defendant and to Messrs. Murphy & Toner and Brown & Guesmer, its attorneys:

You are hereby notified, required and demanded to produce at the trial of the above entitled action your files, books and records as follows:

All inventories made by your company beginning with January 1, 1908, to date, showing the amount, value and location of tangible property, including bills receivable owned by you during such period as well as any other records giving or throwing light upon such information;

All tax receipts or other records showing taxes paid by your company on all property of every kind, nature and description, wherever situate, since January 1, 1908, to date, together with such

records as will show the actual property assessed in the various jurisdictions wherein such taxes have been paid:

Your books or records showing the issuance of the capital stock of your company, all transfers thereof, etc., from which the actual amount of paid-up capital stock during each year from 1908 to date may be ascertained;

The books and records of your company showing the amount of dividends that have been declared on the capital stock thereof since January 1, 1908;

The books and records of your company showing the amount of your indebtedness, if any, during each year since January 1, 1908, aside from indebtedness for current expenses.

You are further notified that in case of your failure to produce the above mentioned files, books and records at the trial of said action, the plaintiff will introduce secondary evidence of the contents and of the matter that might be proved by them.

Dated February 16, 1917.

GEO. E. WALLACE,
THEO. B. ELTON,
O. B. BURTNESSE,
Attorneys for Plaintiff.

27 Endorsed as follows: Original. State of North Dakota, County of Grand Forks. In District Court. The County of Grand Forks, Plaintiff, vs. Cream of Wheat Company, Defendant. Notice to Produce, McIntyre & Burtneess. Attorneys for Plaintiff. Grand Forks, N. Dak. 9270. Due and personal service of the within Notice to Produce is hereby admitted this 16th day of February, 1917, at Grand Forks, N. Dak. Murphy & Toner, Attorneys for Defendant. Filed in the office of the Clerk of the District Court, Grand Forks Co., State of North Dakota, at — o'clock — M., Mar. 20, 1917. M. W. Spaulding, Clerk, by — — —, Deputy.

28 STATE OF NORTH DAKOTA,
County of Grand Forks, ss:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a Municipal Corporation, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Pltf.'s Proposed Findings & Conclusions.

The above entitled matter came regularly on to be heard before the above named Court without a jury on the 29th day of March, 1917, and was tried on March 29th and 30th, 1917, George E. Wal-

lace, Esquire, and O. B. Burtness, Esquire, appearing as attorneys on behalf of plaintiff and Messrs. Brown & Guesmer and Murphy & Toner appearing as attorneys in behalf of the defendant, and the Court, having heard and considered the evidence adduced said trial and the arguments of counsel, does now after due consideration make and file the following Findings of Fact:

Findings of Fact.

1. That the plaintiff is and at all the times hereinafter mentioned was a municipal corporation organized under and by virtue of the laws of the State of North Dakota; and the defendant during the times mentioned in the Complaint herein was and is a corporation duly organized under the laws of the State of North Dakota.

2. That the county auditor of said plaintiff county during the year 1914, acting under the supervision of the State Tax Commission, assessed certain personal property situated in the City of Grand Forks, County of Grand Forks, and State of North Dakota, to-wit: "Bonds and Stocks" for the years 1908, 1909, 1910, 1911, 1912, and 1913 as property having escaped taxation; that all of such personal property was then and there and had been during each of said years the property of the defendant, and had not been assessed or taxed during any of such years; that thereafter such assessment was duly equalized by the board of equalization of said County of Grand Forks, and later duly equalized by the state board of equalization. That during said year 1914 the city assessor of the City of Grand Forks also assessed such property against the defendant for the years above named, and such assessments were duly reviewed by the city board of review and afterwards duly equalized by the county board of equalization and thereafter duly equalized by the State board of equalization; that such records resulted in a single assessment of such property for the years above numerated. That thereafter the county auditor of said Grand Forks county entered and extended upon the tax lists of said county against the personal property of the defendant, so assessed as aforesaid, taxes for each of said years at the same rate and for all the purposes for which taxes were levied upon property in said Grand Forks county in each of said years in the sums as following:

30

For the year 1908 the sum of	\$3,094.00
For the year 1909 the sum of	3,045.00
For the year 1910 the sum of	2,795.00
For the year 1911 the sum of	3,980.00
For the year 1912 the sum of	3,004.00
For the year 1913 the sum of	3,155.00

that the defendant has failed, neglected and refused to pay such taxes.

3. That the city assessor of the City of Grand Forks, North Dakota, during the year 1914 assessed for the year 1914 certain personal property belonging to the defendant situated in the City of Grand Forks, County of Grand Forks and State of North Dakota, to-wit: "Bonds or Stocks"; that thereafter such assessment was reviewed by the city board of review and equalized by the county board of equalization, and also by the state board of equalization and thereupon the county auditor entered and extended upon the tax lists of said county as a tax against said property for the year 1914 the sum of Three Thousand One Hundred Eighty (\$3,180.00) dollars, no part of which has ever been paid.

4. That when the matter of such assessments for all of the years hereinbefore mentioned came before the city board of review the defendant filed in writing with said board its objections to such assessments and protested to each and all of them, which objections and protests were overruled.

5. That when the matter of said assessments for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, so appearing on the assessment roll of the city assessor, and the matter of said assessments for the years 1908, 1909, 1910, 1911, 1912 and 1913, so appearing in said county auditor's book or assessment roll of property which had escaped taxation, came before the board of review and equalization of Grand Forks county, the defendant filed in writing with such board its objections and protests to each and all of them, which objections and protests were overruled.

6. That thereafter and on or about the first day of February, 1916, the Board of County Commissioners of said Grand Forks County, North Dakota, passed and adopted a Resolution as follows: "Whereas, Personal property of the Cream of Wheat Company, a corporation, has been duly assessed for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, and whereas the said Cream of Wheat Company, a corporation, has failed and neglected to pay said taxes for such years, and thereas there is now due and owing to the County of Grand Forks for such taxes levied and assessed for the year 1908 the sum of \$3094.00 together with accrued interest and penalty thereon, for the year 1909 the sum of \$3045.00 together with accrued interest and penalty thereon, for the year 1910 the sum of \$2795.00 together with accrued interest and penalty thereon, for the year 1911 the sum of \$3980.00 together with accrued interest and penalty thereon, for the year 1912 the sum of \$3094.00 together with accrued interest and penalty, thereon, for the year 1913 the sum of \$3155.00 together with accrued interest and penalty thereon and for the year 1914 the sum of \$3180.00 together with accrued interest and penalty thereon, and whereas all of such personal property taxes are now delinquent, and whereas the said Cream of Wheat Company, a corporation, does not seem to have tangible property within the State of North Dakota subject to distress and sale, and that it is therefore deemed expedient by the Board of County Commissioners of Grand Forks County to collect such delinquent taxes by action,"

32 "Now, therefore, be it resolved, that an action be instituted in the name of Grand Forks county for and on behalf of said county for the collection of all of the aforesaid delinquent personal property taxes together with all penalty and interest thereon that will accrue up to the time of the determination of said action, and that the state's attorney of this county be hereby authorized and instructed to commence such action or actions as he may deem fit for the collection of such taxes in the name and on behalf of said county."

That no officer of said defendant corporation ever made out and delivered to the assessor a sworn statement setting forth the name and location of the company and association; the amount of capital stock authorized and the number of shares into which said stock is divided; the amount of capital stock paid up; the market value, or if they have no market value, then the actual value of the shares of stock; the total amount of all indebtedness, except indebtedness of the current expenses, excluding from such expense the amount paid for purchase or improvement of property; the value of all real property, if any; the value of its personal property. That prior to the commencement of this action the plaintiff demanded of the defendant in writing that it produce its books and other records for the purpose of ascertaining the value of its property and that the defendant corporation refused and still refuses so to do; that at the trial of this action the plaintiff demanded of the defendant corporation orally in open court to produce such records, which the defendant corporation refused and still refuses to do.

33 7. That the defendant corporation has no tangible property located in the State of North Dakota, but its principal place of business is in the City of Grand Forks, aforesaid, and there it conducts its regular annual meetings, and in all things complies with the law of the state relative to a domestic corporation.

8. That defendant corporation owned no bonds or stocks of any other corporations.

9. That each and all of said assessments and taxes involved in this action were attempted to be assessed and imposed upon defendant solely under Section 2110, Compiled Laws of North Dakota for the year 1913.

10. That the assessment book of the city assessor of the City of Grand Forks which contained such pretended assessments for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, so appearing on the assessment roll of the city assessor of said City of Grand Forks was duly verified.

From the foregoing Findings of Fact the Court now makes and files the following Conclusions of Law.

Conclusions of Law.

1. That there is no provision of law whereby such intangible property of the defendant may be assessed in the State of North Dakota.

2. That each and all of the pretended assessments and taxes involved in the present action are illegal, null and void and are hereby

been and cancelled from the records of said City and County of Grand Forks, and that plaintiff is not entitled to recover anything in this action, and that defendant is entitled to judgment against the plaintiff for its costs and disbursements herein.

Let judgment be entered accordingly.

Dated at Grand Forks, North Dakota, this — day of October, 1917.

By the Court:

— — —, Judge.

Endorsed as follows: Grand Forks Co. v. Cream of Wheat Co. Off.'s Proposed Findings. 9270. Filed in the office of the Clerk of the District Court, Grand Forks Co., State of North Dakota, at — clock — M., Oct. 30, 1917. M. W. Spaulding, Clerk, by — — —, Deputy.

STATE OF NORTH DAKOTA,
County of Grand Forks:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Defendant's Proposed Findings of Fact, Conclusions of Law and Order for Judgment.

The above case being regularly upon the calendar of said Court came on for trial before the undersigned, Judge of said Court, without a jury, on March 29th, 1917, and was tried on March 29th and 30th, 1917.

Messrs. George E. Wallace and O. B. Burtness appeared in behalf of plaintiff and Messrs. Brown & Guesmer and Murphy & Toner appeared in behalf of defendant.

The Court, having heard and considered the evidence adduced at said trial and the arguments of Counsel, finds the facts to be as follows, and makes the following findings of fact and conclusions of law:

Findings of Fact.

1. That plaintiff during the times mentioned in the complaint, and herein, was and is a Municipal Corporation organized under the laws of North Dakota; and that defendant during the times mentioned in the complaint, and herein, was and is a corporation organized under the laws of North Dakota.

2. That during the year 1914 there was placed on the assessment roll of the city Assessor of the City of Grand Forks under the classification of "Bonds and Stocks" a pretended assessment

36 against defendant in the amount of \$50,000 as for the year 1914; that during the year 1914 there was placed on the assessment roll of the City Assessor of the City of Grand Forks under the classification of "Bonds and Stocks" pretended assessments against defendant in the amount of \$50,000 for each of the years 1908, 1909, 1910, 1911, 1912 and 1913.

3. That each and all of said pretended assessments for the years 1908, 1909, 1910, 1911, 1912, and 1913 so placed upon the assessment roll of said City Assessor were made by the Tax Commission of North Dakota acting through said City Assessor and were directly made by said Tax Commission.

4. That when the matter of said pretended assessments for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 so appearing on the assessment roll of said City Assessor came before the Board of Equalization of the City of Grand Forks, defendant filed with said Board objections and protests to each and all of said pretended assessments, which objections and protests were overruled.

5. That during the year 1914, and subsequent to the time when said pretended assessments for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 had been placed on the assessment roll of said City Assessor, there was placed in the County Auditor's book or Assessment Roll of property which had escaped taxation, pretended assessments against defendant under the classification of "Bonds and Stocks" in the amount of \$50,000 for each of the years 1908, 1909, 1910, 1911, 1912 and 1913, and on account of the same alleged property which had previously been attempted to be assessed for the same amounts and for the same years on the assessment roll of said City Assessor; that at the time when said pretended assessments were so placed in said County Auditor's book or Assessment Roll of property which has escaped taxation, said pretended assessments so

37 appearing on the assessment roll of said City Assessor had not been set aside by the judgment of any Court, and the alleged property which was attempted to be assessed by said pretended assessments so placed in said county Auditor's book or Assessment Roll had not then been omitted in the assessment of any previous year or years.

6. That each and all of said pretended assessments for the years 1908, 1909, 1910, 1911, 1912 and 1913 so placed in said County Auditor's book or Assessment Roll of property which had escaped taxation, were made by the Tax Commission of North Dakota acting through said County Auditor and were directly made by said Tax Commission.

7. That when the matter of said pretended assessments for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 so appearing on the assessment roll of said City Assessor and the matter of said pretended assessments for the years 1908, 1909, 1910, 1911, 1912 and 1913 so appearing in said County Auditor's book or Assessment Roll of property which had escaped taxation, came before the Board of Review and Equalization of the County of Grand Forks, defendant filed with said Board objections and protests to each and all of said pretended assessments, which objections and protests were overruled.

8. That thereafter pretended taxes on account of said pretended assessments so made in 1914 were extended against defendant on the tax lists of the County of Grand Forks as follows:

For the year 1908 the sum of.....	\$3094
For the year 1909 the sum of.....	3045
For the year 1910 the sum of.....	2795
For the year 1911 the sum of.....	3980
For the year 1912 the sum of.....	3094
For the year 1913 the sum of.....	3155
For the year 1914 the sum of.....	3180

9. That defendant's business during the times mentioned in the complaint, and herein, and during all of the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 was and is the manufacture and sale of a breakfast food known as "Cream of Wheat"; that prior to 1908 defendant duly complied with the laws of Minnesota relating to foreign corporations and obtained a license to transact business in the State of Minnesota; that prior to 1908 defendant established and has since continuously maintained and operated a factory for the manufacture of, and a sales office for the sale of, said product known as "Cream of Wheat" in the City of Minneapolis, Hennepin County, Minnesota; that at all times during the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, defendant maintained no factories or sales offices other than said factory and sales office in said City of Minneapolis; that at all times during said years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 all orders for defendant's said product "Cream of Wheat" were received by and filled through said Minneapolis factory and office of defendant, and that for convenience and economy in distribution, defendant, to fill orders, stored considerable quantities of said product in various cities in the United States; that during all of said years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 all books of account of defendant were kept at said Minneapolis office and all remittances and payments of money to defendant were received at said Minneapolis office of defendant.

That at no time during the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 did defendant own or have, and at no time since those years has defendant owned or had, any real estate or property of any kind within the state of North Dakota, or any money on deposit there; that during the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 defendant maintained an office at the First National Bank of Grand Forks, but that at no time during any of said years did defendant transact, and that at no time since those years has defendant transacted, any business of any kind at said office at the First National Bank of Grand Forks or at any other place in North Dakota, except that defendant's corporate meetings were held at said office at the First National Bank of Grand Forks; that for said office so maintained by defendant at said First National Bank of Grand Forks, there was used, during all of said times, merely a portion of the ordinary banking quarters of the said First National Bank of

Grand Forks, and that all fixtures and property of every kind in and about said office at said First National Bank of Grand Forks were, during all of said times, owned by said First National Bank of Grand Forks, and that during all of said times defendant used said portion of said banking quarters as such office merely as a favor from said First National Bank of Grand Forks.

That during all the times mentioned in the complaint, and herein, and during all the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, defendant owned and had extensive real estate holdings in Minnesota and a large amount of personal property which was permanently located at said factory in Minneapolis and at other places beyond the borders of North Dakota; that during all the times mentioned in the complaint, and herein, and during all of the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, all of defendant's property of every kind and description was permanently located beyond the borders of North Dakota; that during all the times mentioned in the complaint, and herein, and during all of the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, all of the defendant's business of every kind and nature, except the mere holding of said corporate meetings, was transacted beyond the borders of North Dakota.

10. That defendant was assessed and defendant paid taxes for all of the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, upon all of its real estate and personal property in the state of Minnesota and other states where its said property was located and its business carried on.

11. That at no time during any of the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 did defendant own any bonds or stocks of any kind.

12. That each and all of the pretended assessments and taxes involved in this action were attempted to be assessed and imposed upon defendant solely under Section 2110, Compiled Laws of North Dakota for 1913, and upon defendant's own capital stock on account of an alleged value of defendant's intangible property.

13. That defendant was never at any time requested by anyone to make out for any of the years 1908, 1909, 1910, 1911, 1912, and 1913 the statement provided for by Section 2110, Compiled Laws of North Dakota for 1913.

14. That in the case of each and all of the pretended assessments and taxes involved in the present action, there was not made out by any of the assessing and taxing officials any statement as provided for by Section 2110, Compiled Laws of North Dakota for 1913, nor did any of the assessing and taxing officials in the case of any of said pretended assessments and taxes make any computations or calculations as to the various items and amounts which are required to be set forth in the statement provided for by said Section 2110, Compiled Laws of North Dakota for 1913.

15. That "Personal Property Assessment Book #4 for 1914, City of Grand Forks," which contained said pretended assessments for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914 so appearing

on the assessment roll of the City Assessor of the City of Grand Forks was not subscribed and sworn to by the City Assessor of the City of Grand Forks, and that no oath was in fact administered to said City Assessor.

Conclusions of Law.

1. That each and all of the pretended assessments and taxes involved in the present action are illegal and null and void and are hereby stricken and cancelled from the records of said City and County of Grand Forks, and that plaintiff is not entitled to recover anything in this action, and that defendant is entitled to judgment against plaintiff for its costs and disbursements herein.

Let judgment be entered accordingly.

Dated ———, 1917.

By the Court:

—— —, *Judge.*

41 Endorsed as follows: Original. State of North Dakota, County of Grand Forks. In District Court, First Judicial District. County of Grand Forks, in the State of North Dakota, a Municipal Corporation, Plaintiff, vs. Cream of Wheat Company, a Corporation, Defendant. Defendant's Proposed Findings of Fact, Conclusions of Law, and Order for Judgment. Brown & Guesmer, 1000 Metropolitan Life Bldg., Minneapolis, Minnesota, and Murphy & Toner, Grand Forks, North Dakota, Attorneys for Defendant. Personal service of the within is hereby admitted this 30 day of April, 1917. McIntyre & Burtness, Attorneys for Plaintiff. 9270. Filed in the office of the Clerk of the District Court, Grand Forks Co., State of North Dakota, at — o'clock —. M., Oct. 30, 1917. M. W. Spaulding, Clerk, by ———, Deputy.

42 STATE OF NORTH DAKOTA,
County of Grand Forks:

In District Court, First Judicial District.

GRAND FORKS COUNTY, Plaintiff,

vs.

CREAM OF WHEAT CO., a Corporation, Defendant.

Memorandum.

In this action the County of Grand Forks, as plaintiff, is seeking to recover a judgment against the defendant, Cream of Wheat Company, a corporation, for certain taxes alleged to be due and owing by the latter for the years 1908 to 1914 both inclusive.

The defendant, in its answer to the plaintiff's complaint sets up various defects and irregularities in the proceedings culminating in

the assessment for the several years, and in addition makes the claim that in none of the years did the corporation own or possess any property subject to taxation in the State of North Dakota.

The defendant, Cream of Wheat Company is, and for a number of years prior to 1908 had been, a corporation organized under the laws of the State of North Dakota for the manufacture and sale of a cereal known as Cream of Wheat. In its articles of incorporation, the City of Grand Forks is designated as its principal place of business. At no time, however, during any of the years mentioned, has the defendant corporation maintained any office in North Dakota, nor has it owned or possessed any tangible property in said State. Its executive offices are maintained in the State of Minnesota, where its books and records are kept, and where its real and personal tangible property is, and always has been located.

It is conceded by counsel for plaintiff that the taxes which have been levied against the defendant for the several years have been so levied solely on account of its corporate franchise; that is, the right granted to the incorporators by the State to do business in a corporate capacity. In a general way the franchises of a corporation have been classified as primary, and secondary.

"The right of an incorporated company to be a corporation, or the right conferred upon it by the State, to be an artificial body, has been called its primary franchise, and this has been distinguished from what is termed its secondary franchises, which include the right to carry on or transact a particular kind of business, as in the case of the privileges granted to a water company with the right to take tolls etc.; or the right of a railroad company to collect fares; or of a toll road company to exact toll for services performed. * * * So in certain tax cases the distinction between the franchise to be a corporation and other rights, privileges and franchises of the corporation, has been the subject of much discussion and many adjudications."

Joyce on Franchises, Sec. 8.

The primary franchise, "the right to be" is often designated as the "general franchise" or the "corporate franchise," while the secondary franchises "the right to do," are designated as "special franchises."

The cases are unanimous in holding that the special franchises of a corporation are "property." There are also many cases in which it is held that a "corporate franchise" is property, but it will generally be found that this is due to some specific provision of the State Constitution or statute. There is also a woeful laxity in the use of terms by the Courts in speaking of franchises. For instance, in the Duluth Gas & Water Co. case the Court uses the term "Corporate Franchises" as applying to both the primary and secondary franchises and in numerous cases the term "franchises" may be construed to cover the corporate franchise, although in fact special franchises were the only franchises under consideration.

Special franchises, and corporate franchises, when considered as property, are deemed the intangible property of the corporation, and distinguished from the tangible property. As before stated, it is the

corporate franchise of the defendant that the plaintiff has sought to tax in this case. There is no attempt made to tax tangible property. Counsel in their brief say:

44 "The intangible property taxed in the instant case is the right of the defendant to exist."

Now there is no law in this state authorizing, or providing for the assessment or taxation of corporate franchises as such. The only provisions of the law of this State authorizing or providing for the assessment and taxation of the tangible or intangible property of the corporations of the class to which this defendant belongs, are those contained in the Constitution and in the general revenue laws. Section 176 of the Constitution provides that:

"Laws shall be passed taxing by uniform rule all property according to its true value in money."

And such laws must be general, not local or special.

Constitution; section 69, subdivision 23.

Pursuant to these constitutional provisions general revenue laws have been passed by the legislature providing for the taxation of the tangible and intangible property of corporations.

Section 2075, Chapter 34 of the Rev. Codes of 1913, provides:

"All real and personal property in this state, and all personal property of persons or of corporations residing or doing business therein, and the property of corporations *residing or doing business therein*, and the property of corporations now existing or hereafter created, * * * is subject to taxation, and such property, or the value thereof, shall be entered in the list of taxable property for that purpose, in the manner prescribed by this chapter."

Section 2093: "All property subject to taxation shall be listed and assessed every year, at its value, on the first day of April preceding the assessment."

Section 2094: provides that all personal property of corporations shall be listed by the president, agent or officer of such corporation.

Section 2102: "Every person required by this chapter shall, when called upon by the assessor, make out and deliver to the assessor, a statement verified by oath, of all the personal property in his possession or under his control, and which by the provisions of this chapter he is required to list for taxation, either as an owner or holder thereof, or as * * *; but no person shall be required to include in his statement any share or portion of the capital stock or property of any company or corporation which such company or corporation is required to list or return as its capital or property for taxation in this state."

Section 2103: "It shall be the duty of the assessor to determine and fix the true and full value of all items of personal property included in such statement, and enter the same opposite such items respectively, so that, when completed, such statement shall truly set forth:" (Then follows a list of 27 items of which No. 21 is as follows:)

"21. The amount and value of bonds and stocks other than bank stock."

45 Sec. 2110: The president, secretary or principal accounting officer of any company or association, whether incorporated or unincorporated, except banking corporations whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock setting forth particularly:

1. The name and location of the company and association.
2. The amount of capital stock authorized and the number of shares into which said capital stock is divided.
3. The amount of capital stock paid up.
4. The market value, or if they have no market value, then the actual value of the shares of the stock.
5. The total amount of all indebtedness except the indebtedness for current expenses, excluding from such expenses the amount paid for purchase or improvement of property.
6. The value of all real property, if any.
7. The value of its personal property.

The aggregate amount of the fifth, sixth and seventh items shall be deducted from the total amount of the fourth, and the remainder, if any, shall be listed as 'bonds or stocks' under subdivision 21 of Section 2103. The real and personal property of each company or association shall be listed and assessed the same as other real and personal property. In case of failure or refusal of any person, officer of company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain."

In this case no statement such as is provided for in Section 2110 was made out by any officer of the corporation in any of the years but was made by the city assessor and by other proper officers authorized to make assessments of property that had escaped taxation. The taxing officers had no data from which to arrive at the amount or value to be assessed as "bonds and stocks," but it was somewhat arbitrarily fixed at \$50,000 for each of said years. While the defendant entered a protest against the assessment, it made no effort and wholly failed to give any of the information required by section 2110.

The undisputed testimony shows that during none of said years did defendant own any "bonds or stocks," and upon the trial counsel for plaintiff admitted that the assessments and taxes were assessed and levied solely under section 2110 above quoted, and upon defendant's intangible property as evidenced by the excess in value of its capital stock over and above the value of its tangible property.

Although the assessment was concededly made under section 2110 and although it is alleged in the complaint that the County Auditor, during the year 1914 duly assessed certain personal property (of the defendant corporation) "as property having escaped taxation," and that during the year 1914 the City Assessor "duly assessed for the year 1914 certain personal property belonging to defendant * * * to wit: "Bonds and stocks," and that these assessments were duly reviewed and equalized by the County and State Boards, and that the County Auditor entered and extended upon

the tax list "against the said property of said defendant" taxes for each of said years; and although the resolution passed by the Board of County Commissioners authorizing the commencement of this action, recites:

"Whereas, personal property of the Cream of Wheat Company, a corporation, has been duly assessed for the years 1908 to 1913 inclusive, and whereas, all of such personal property taxes are now delinquent," yet counsel for plaintiff contends that the tax which the plaintiff seeks to recover in this action is not a "property tax" but an "excise tax."

In their brief, counsel for plaintiff, with reference to the tax assessed in this case, say:

"It is not a tax upon the capital stock of the corporation; neither is it a tax against the individual stockholders, but it is an excise tax against the corporation itself, and as such is not in any sense a property tax."

Again, they say:

"Should the value of the capital stock, however, exceed the value of all the property, both real and personal, of the corporation, there is then an excise tax levied against the difference. This however is not a tax levied under the general property system, but is surely and simply an excise tax."

And in conclusion, counsel say:

"The tax in question is not a property tax, but is a tax on the franchise of being a corporation, that is, a tax levied for the privilege of various individuals going together as a corporation, thereby claiming all the benefits which a corporation has in the active affairs of commercial life over a partnership or over the transaction of an individual; such tax is not a property tax; neither is it a tax on the special franchise of a corporation, because in this case the corporation has no special franchise. The tax is an excise tax and is not subject to the rules of uniformity demanded in the constitution."

The Supreme Court of the United States, in *Flint vs. Stone-Tracy Co.*, 220 U. S. 107, said:

"Excise—are taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue occupations and upon corporate privileges."

And in *State vs. Grand Trunk R. Co.*, 142 U. S. 217, in speaking of an excise tax, the Court say:

47 "The designated excise tax does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings * * * or to exercise particular franchises."

An "excise tax," when imposed upon a corporation for the privilege of existing and doing business as a corporation, is termed a "franchise tax" as distinguished from a "property tax" when levied upon special franchises. As was said in *Hamilton Company vs. Mass.*, 6 Wall. 632 (640), with reference to certain provisions of the Mass. Constitution:

"Property taxation and excise taxation, as authorized in the Con-

stitution of the State, are perfectly distinct, and the two systems are easily distinguished from each other."

And in *Provident Institution vs. Mass.* 6 Wall. 611 (631) the Court said:

"Franchise taxes are levied directly by an act of the legislature and the corporations are required to pay the amount into the State Treasury. They differ from property taxes, as levied for State and municipal purposes, in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection.

Sometimes these franchise taxes are in lieu of all other taxes, but it is more often the case that both a property and a franchise tax are authorized by statute.

One of the marked characteristics of an excise tax is that it is levied directly by the legislature, and another is, that it is payable into the state treasury. It is a tax levied, not against the property of a corporation, but against the corporation itself, and the method of arriving at the amount of tax to be paid varies in different states, and as applied to different kinds of corporations; *Society for Savings vs. Coit* 6 Wall. 594, (608).

I doubt if any case can be found in which it appears that a "franchise tax," as such has ever been assessed by local authorities, excepting in cases wherein it was included, as a mere incident, with other intangible property and special franchises.

Counsel for plaintiff has cited many cases in support of their contention that the tax in this case is an excise (franchise) tax.

48 Among the cases cited are a number of Massachusetts cases and a few United States Supreme Court cases appealed from Massachusetts, and construing its laws.

In the case of *Provident Institution vs. Mass.* 6 Wall. 611 it appears that by a provision of the State Constitution, the legislature was empowered "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident, and estates lying within the said commonwealth, and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatever." By some certain earlier decision of that State, it had been held that the term "commodities" as used in the Constitution included "corporate franchises." A provision of the state statute provided that every institution for savings incorporated under the laws of the Commonwealth should pay to the Commonwealth, "a tax on account of its deposits of one half of one per cent per annum on the amount of its deposits. It was held in that case that the tax was a franchise tax and not a property tax.

Hamilton Company vs. Mass. 6 Wall. 632, was a case arising under a law of Massachusetts, which provided that every corporation should annually pay to the state treasurer a tax of one and one sixty per cent upon the excess of the market value of its capital stock over the value of its real estate and personal property. It was held that this was a franchise tax and not a property tax.

The other Mass. cases cited construe the same or similar provisions of the statutes of that state.

Counsel have cited *Society for Savings vs. Coite*, 6 Wall, 594. In this case it appears that a statute of the State of Connecticut required savings societies authorized to issue bills, and having no capital stock, to pay into the state treasury a sum equal to three fourths of one per cent on the total amount of their deposits on a given day, and it was held that this statute imposed a franchise tax, and not a tax on property.

The Court say:

"Reference is evidently made to the total amount of deposits on the day named, not as the subject matter for assessments, but as the basis for computing the tax required to be paid by the corporation defendants."

The case of *Home Ins. Co. vs. New York*, 134 U. S. 594, was one arising under the laws of New York State. An act of the legislature of that state declared that every corporation incorporated under any law of the state or any other state or country, and doing business in the state, should be subject to a tax upon "its corporate franchise or business to be computed as follows: "If its dividend or dividends made or declared during the year ending the first day of November amount to six per cent or more upon the par value of its capital stock, then the tax to be at the rate of one quarter mill upon the capital stock for each one per cent of the dividends, etc. It was held not to impose a property tax, but was, as it purported to be, a franchise tax. Construing a similar statute the court, in *People vs. Knight*, 67 N. E. 65 (N. Y.) said:

"A franchise tax is not laid upon property at all, but is imposed upon the corporation for the privilege of carrying on business in this state, and exercising the corporate franchises granted by the state. The distinction between a tax upon the property of a corporation and a franchise tax, although well established and of great importance, is easily overlooked."

See also, *Lumberville, etc. Bridge Co. vs. State Board*, 26 Atl. 711 (N. J.)

The case of *Minot vs. Railroad Company* (otherwise known as the *Delaware Railroad Tax Case*) 18 Wall, 206, involved the construction of the fourth section of an act of the State of Delaware which provided that every company of the class designated should, in addition to other taxes, also pay to the treasurer of the state for its use, on the first day of July in each year, a tax of one fourth of one per cent upon the actual cash value of every share of its capital stock. The court say (P. 231):

"As we construe the language of the fourth section, the tax is neither imposed upon the shares of the individual stockholders nor upon the property of the corporation, but it is a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though an arbitrary one is approximately just, at any rate is one which the legislature of Delaware was at liberty to adopt."

The case of *Horn Silver Mining Co. vs. New York*, 143 U. S. 305, much relied upon by counsel for plaintiff, involves the ques-

tion of the validity of the same law that was involved in the case of Home Insurance Co. vs. New York, *supra*. The Mining Company was a corporation organized under the laws of Utah, but doing business in a number of states, including the State of New York though but a small part of its business was transacted in the latter state. The court simply held that the state legislature had the absolute right to impose upon foreign corporations any conditions it might see fit for the privilege of doing business in the state; that however unjust these conditions might be, it was a matter with which the courts had nothing to do, but appeal should be made to the legislature.

The Pennsylvania, Maryland, Maine and Vermont cases, cited by counsel, involved statutes imposing purely excise and franchise taxes, similar to those I have specifically mentioned. The tax was levied by the legislature and payable directly to the State.

As an instance of an excise tax, counsel cite the inheritance tax of this state. Code 1913, Sec. No. 8976 et seq. This tax is levied by the legislature and is payable to the state, with the exception of two per cent, which is retained in the county general fund.

In *Standard Underground Cable Co. vs. Atty. Gen.* 19 Atl. 733, (N. J.) it appears that the statute in New Jersey provided that the class of corporations to which the Cable Co. belonged should pay a yearly tax of 1/10 of one per centum in the amount of its capital stock. The court held that this was not a property tax, and did not fall within the provision of the constitution that "property should be assessed for taxes, and by uniform rules, according to its true value."

51 Referring to the same statute the court in *Honduras Commercial Co. vs. State Board*, 23 Atl. 668 (N. J.), said: "The tax imposed is a franchise tax, exacted from the Company as the price of the right and privilege which it received from the state of being a corporation. Although the amount to be paid is determined by the amount of the capital stock, and the duration of the corporate life, yet these are only two criteria chosen by the legislature for ascertaining the probable value of the corporate franchise which the Company assumed. The tax is not levied upon the corporate property or business. Such a tax may be collected by the State granting the corporate franchise, no matter how the property of the company may be invested or employed, or where it may be situate."

As has been seen from the cases cited, in the taxation of corporate franchises very different methods are pursued from those pursued in the taxation of property. When corporate franchises are taxed as such alone, the levy is invariably made by the legislature, arbitrarily and without regard to values; while in the taxation of property of corporations of the class to which defendant belongs, the tax is based upon an assessment by some local officer, and this assessment is based upon the value of the property.

"It is true, as said by this Court in *California vs. Pac. R. Co.* 127 U. S., 1 (41) that the taxation of a corporation franchise has no limitation but the discretion of the taxing power, and its value is not

measured like that of property, but may be fixed at any sum that the legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted remedy must be sought by appeal to the legislature; it cannot be furnished by the federal tribunal" *Home Ins. Co. vs. People* 134 U. S. 594.

It is apparent from a survey of all the authorities, not only those cited, but many others, that the tax sought to be recovered in this case is not an excise tax upon the corporate franchise. There is no such thing known to the law of this State.

"The test, whether the tax in any given case is a franchise as distinguished from a property tax, would seem, from the authorities, to be that a tax according to a valuation is a tax upon property, whereas a tax imposed according to nominal value or measured by some fixed standard of mere calculation, as contrasted with valuation fixed by the law itself may be a franchise tax."

Joyce on Franchises, Sec. 424, p. 752.

52 The law under which the tax was imposed upon the defendant provides only for the taxation of the property of the corporation.

See *Detroit F. & M. Ins. Co. vs. Hartz*, 94 N. W. (7) Michigan.

State vs. Duluth G. & W. Co. 78 N. W. 1032 (Minn.).

All corporations and other persons are required by law, to make out, for the purposes of assessment, a list of their personal property. (Sec. 2103). Among the items in this list is "Bonds and Stocks." It is this item of personal property that is sought to be taxed in this case. This item does not mean the bonds and stocks of other corporations held by the corporation making out the list, but it means its own capital stock not its entire capital stock, it is true, but an amount determined by computation from the data provided for in section 2110. The statement provided for by section 2110 is not an assessment list, but is required of corporations simply for the purpose of giving to the local assessor information upon which he may base an intelligent judgment as to "the amount and value of bonds and stocks." The tangible property of corporations is listed and assessed the same as that of individuals. By means of the statement the local assessor is enabled to list and assess the capital stock representing the value of the intangible property of the corporation. The capital stock represents the corporate estate, whether tangible or intangible.

"A tax on the capital stock of a corporation is a tax on its property and assets."

Commonwealth vs. N. Y. Pr. & O. R. Co. 41 Atl. 594 (Pa.).

Commonwealth vs. Beech Creek R. Co. 41 Atl. 605 (Pa.).

People vs. Knight, 67 N. E. 65 (N. Y.).

State vs. Savage, 91 N. W. 716 (722) Neb.

The intangible property of the corporation has been defined as "corporate excess," "franchise," "good will," "system," "Union use," and "business facilities."

State vs. West. Union Tel. Co. 104 N. W. 567 (Minn.)

In the majority of cases it is the good will which makes up the value of the capital stock in excess of the tangible property. If a corporation possesses special franchises, these also go to enhance the value of the stock. And while in one or two states, by reason of

peculiar provisions of the constitution or statute, the courts have said that this excess value also includes the value of the corporate franchise, it has been so held only in cases where the corporations possessed also special franchises and there was no attempt to value the corporate franchise alone. It is a matter of common knowledge however, that the corporate franchise alone has no money value. It can neither be mortgaged, leased, levied upon nor sold. Yet in this case the corporate franchise of the defendant has been assessed for each year at \$50,000.

"The franchise or bare right to do a thing considered with reference to itself alone is of no value."

Sullivan vs. Lear, 2 So. Rep. 846 (Fla.).

Section 2103 provides:

"It shall be the duty of the assessor to determine and fix the true and full value of all items of personal property included in" the statement required by Section 2102 to be made out by individuals, corporations and others. "Bonds and stocks," that is, the intangible property of corporations, is one of these items. The assessor therefore, in assessing this item of intangible property is required to determine and fix the true and full value thereof.

Section 2122 provides;

"All property shall be assessed at its true and full value in money. In determining the true and full value of real and personal property the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price of which said property would sell at auction or at forced sale, or in the aggregate with all the property in the town or district, but he shall value each article or description of property by itself and at such sum or price as he believes the same to be fairly worth in money."

Section 2074 provides:

"The terms used in this chapter are defined as follows: * * The term "true and full value" means the usual selling price at the place where the property to which the term is applied shall be at the time of the assessment, being the price which could be obtained therefor at private sale, and not at a forced public auction sale."

Morawitz, in his work on Corporations, at section 929 says:

"Care must be taken to distinguish between the different meanings of the word value. One meaning of the word is "price," or "the amount for which a thing can be sold." In this sense franchise

have clearly no value whatever, because by their nature they are not transferable. They cannot be sold or leased or mortgaged, nor can they be taken under execution."

See also, Bank of Calif. vs. San Francisco, 64 L. R. A. 918, dissenting opinions.

In Detroit Citizens St. Ry. Co. vs. Common Council, 85 N. W. 96 (Mich.) the court say:

"For the purpose of the discussion of the question before us, we will treat franchises as of three classes: First, the right to organize and exist as a corporation; second, the right to act generally as a corporation; and third, the special privileges granted to it which are not possessed by the individual under general laws. * * * The first of these is enjoyed by all corporations, legally formed, and also by all assuming to be corporations through user. This right to exist as a corporation is not transferable, and therefore cannot be said to have a cash value in the sense of our statute. Cash value and actual value are said to have the same meaning, viz: "The amount at which property would be estimated if taken in payment of a liquidated demand from a solvent debtor." Weltz, Assessment, Sec. 130, and cases cited. The term is fixed, however, by our statute (Com. Laws, Sec. 3850) which provides: "The words cash value, when used in this act, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of the assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale." Apparently the intention was not to tax property having no cash value. If it were transferable, it would seldom be worth more than a nominal price, by reason of the facility with which such corporations may be organized under our general laws, which is the only way that private corporations can be created in Michigan. Again, franchises of the second class are incident to all corporations, and are manifestly of no more value than the right to exist; for they naturally and impliedly go with it and are not transferable. * * * It seems not to have been the policy of the state to place any price or tax upon the right to exist or act as a corporation until recently. Now a franchise tax is exacted from all newly formed domestic corporations, as well as those of foreign states and countries, which choose to do business within the state. This is in no sense a tax *in* upon property. * * * The price of these privileges is proportionate to the capital employed. Whether the state might treat these franchises as property and provide for their assessment on an ad valorem basis, we need not inquire. It has not been done, and there seems to be little inducement for such action, because of the trifling value of the abstract right of corporate existence. * * * There is no more excuse for ascribing a fictitious value to property, whether tangible or intangible, than there is justice in undervaluing or omitting it from the tax roll."

See also, Western Union Tel. Co. vs. Omaha, 103 N. W. 84 (Neb.).

But it is unnecessary to seek authorities upon the question as to whether a corporate franchise has any assessable value. That mat-

ter has been settled in this state by the statutory definition of "true and full value." If it cannot be transferred it cannot possibly have any value "in money."

While it would be entirely competent for the legislature to prescribe a corporate franchise tax in the nature of an excise tax, the fact remains, that the legislature of this state has not done so, and that if the corporate franchise can be reached for taxation at all, it can only be through the provisions of the statute providing for the taxation of intangible property upon an ad-valorem basis.

I am aware that there are numerous cases in which it is said that the "corporate franchise" is property. In many cases this is due to a specific provision of the state constitution or statute declaring it to be property; in many others it is due to the construction given by the courts to certain constitutional or statutory provisions, and in other cases it is due to a careless failure to distinguish between "corporate franchises" and "special franchises."

See *State vs. Duluth Gas & W. Co.* 78 N. W. 1032 (Minn.).

It would serve no good purpose to cite and distinguish all of these cases. It is sufficient for our purpose to consider only the provisions of our own statute. The thing of which there may be ownership is called property (Sec. 5245). The corporation does not own the corporate franchise.

The franchise to be, and to exercise the powers of, a corporation are not granted to or possessed by the corporation. These rights are given to and owned by the individuals composing the corporation. Again, section 5490 provides, that all property (with two exceptions) may be transferred. Corporate franchises are not transferable, and therefore, cannot be property. A corporate franchise, in the absence of a statutory provision declaring it to be such, is no more property than is a public office.

But even if the corporate franchise be considered as property, it is not the property of the corporation, but of the incorporators. The right to become and be a corporation, and to do business as such, is not granted to the corporation, but to the incorporators, and if the right to possess and use corporate powers is valuable at all, it is valuable only to the incorporators. The corporate franchise, therefore, in the absence of any constitutional or statutory provision to the contrary, is the property of the incorporators rather than of the corporation.

56 "The franchise of being a corporation belongs to the incorporators, while the powers and privileges, vested in and to

exercised by the corporate body as such, are the franchises of the corporation."

Memphis R. R. Co. vs. Commissioners, 112 U. S. 609 (619).

Southwestern T. & T. Co. v. City, 73 S. W. 859 (Tex.).

State vs. Topeka Water Co. 60 Pac. 337 (Kans.)

Pierce vs. Emery, 32 N. H. 484.

Louisville Tobacco W. Co. vs. Commonwealth, 48 S. W. 420-423 (Ky.)

Same case, 49 S. W. 1069 (Ky.).

Filstom vs. Hay, 13 N. E. 501 (Ill.).

Thompson on Corporations, Sec. 5335.

Cedar Rapids Water Co. vs. City, 91 N. W. 1081 (Ia.).

State vs. Georgia Med. Soc. 38 Ga. 608 (626).

State vs. Portage City Water Co. 83 N. W. 695 (699) Wis.

Driscoll vs. Norwich & W. R. Co. 32 Atl. 354 (357). Dissenting opinion.

Central Trust Co. vs. Western N. C. R. Co. 89 Fed. 24.

Blackrock Copper M. & M. Co. vs. Tingey, 28 L. R. A. (N. S.) 255 (Utah).

Linden Land Co. vs. Mil. E. Ry. Co. 83 N. W. 851 (858) Wis.

Sec. 5245 Code 1913.

It is a general and well established principle that the situs of the tangible property of a corporation is where its tangible property located and its business is carried on, and that a state is as powerless to tax a corporation on intangible property which has been given a business situs beyond the borders of the state, as it is to tax tangible property located beyond its borders, and this rule is not restricted in its application to corporations owning special franchises; for if corporate franchises are to be deemed in any sense property, they belong to the class designated as intangible property. The argument is that these franchises have no value except from their "union in use" with the tangible property, as a system—

Adams Express Co. vs. Ohio, 165 U. S. 194.

Same case, 166 U. S. 185.

Western Union Tel. Co. vs. Mass. 125 U. S. 530.

Mass. vs. Western Union Tel. Co. 141 U. S. 40.

Maine vs. Grand Trunk Ry. Co. 142 U. S. 217.

Pittsburg, Cin. etc. Ry. Co. vs. Backus, 154 U. S. 421.

Cleveland C. & C. Ry. Co. vs. Backus, 154 U. S. 439.

West. Union Tel. Co. vs. Taggart, 163 U. S. 1.

Pullman's Palace Car Co. vs. Penn. 141 U. S. 18.

Louisville etc. Ferry Co. vs. Kentucky, 188 U. S. 385.

Commonwealth vs. West. Ind. etc. Co. 129 S. W. 301 (Ky.).

Sullivan vs. Lear, 2 So. Rep. 846 (Fla.).

State vs. Savage, 91 N. W. 716 (Neb.).

West. Union Tel. Co. vs. Omaha, 103 N. W. 84 (Neb.).

Detroit Citizens St. Ry. Co. vs. Common Council, 85 N. W. 96 (Mich.).

State vs. Anderson. 63 N. W. 746 (Wis.).

Fenl du Lac W. Co. vs. City, 52 N. W. 439 (Wis.).

57 The only case cited by counsel for plaintiff which militates in any degree against the conclusions I have reached is that of Bank of California vs. San Francisco, 64 L. R. A. 918. Not only do the cases cited by the California Court (excepting the California cases) fail to support its conclusions, but throughout its reasoning is illogical and specious. The opinion was handed down by a divided court (four against two) and an application for a rehearing was denied by an evenly divided court.

In my opinion, therefore, the corporation having no property in the State of North Dakota, subject to taxation, in any of the designated years, the assessment and taxation of the defendant was without authority and void and is an attempt to deprive defendant of its property without due process of law.

Dated, Grand Forks, N. D. this 18th day of September, 1917.

CHAS. M. COOLEY, Judge.

As to the questions regarding the defects and irregularities in the various assessments, these are resolved in favor of plaintiff.

C. M. C.

Endorsed as follows: 9270. State of North Dakota, County of Grand Forks. In District Court. County of Grand Forks, a Municipal Corpn., Plaintiff, vs. Cream of Wheat Co. a corporation, Defendant. Memorandum. Filed in the office of the Clerk of the District Court, Grand Forks Co., State of North Dakota, at — o'clock — M. Sep. 21, 1917. M. W. Spaulding, Clerk, by — — Deputy.

58 STATE OF NORTH DAKOTA,
County of Grand Forks:

• District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA,
Municipal Corporation, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Findings of Fact, Conclusions of Law, and Order for Judgment.

The above entitled cause being regularly on the March 1917 Term calendar of the above named Court, came duly on for trial at Grand Forks, North Dakota, before the Hon. Chas. M. Cooley, Judge of said court, without a Jury, on the 29th day of March, 1917, Geo. E. Wallace Esq., and O. B. Burtness, Esq., appearing as counsel for the Plaintiff, and Messrs. Brown & Guesmer, and Murphy & Toner appearing as counsel for the defendant, and the court having heard and considered the evidence adduced at said trial, and the arguments

ounsel, and being fully advised in the premises, makes and files
herein the following

Findings of Fact.

The Court finds

I.

That the Plaintiff during the times mentioned in the complaint,
and herein, was and now is, a municipal corporation organized under
the laws of the State of North Dakota.

II.

That the defendant during the times mentioned in the complaint
and herein was and now is, a corporation organized under the laws
of the state of North Dakota.

III.

That in neither or any of the years 1908, 1909, 1910, 1911, 1912,
or 1913, was any property of the defendant assessed or attempted to
be assessed for taxation, or taxed, in the State of North Dakota.

IV.

That in neither or any of the years 1908, 1909, 1910, 1911, 1912,
or 1913, or 1914, did the defendant make out or cause to be made
out any statement such as is required by Section 2110, Compiled
Laws of 1913.

V.

That during the year 1914 there was placed on the assessment roll
of the City Assessor of the City of Grand Forks, under the classifica-
tion of "Bonds and Stocks" pretended assessments against Defend-
ant in the amount of \$50,000.00 for each of the years 1908, 1909,
1910, 1911, 1912, and 1913; that each and all of said pretended as-
sessment for said years, so placed upon the assessment roll of said
City Assessor, were made by the Tax Commission of North Dakota,
acting through said City Assessor, and were directly made by said
Tax Commission.

VI.

That during the year 1914 there was placed on the assessment roll
of the City Assessor of the City of Grand Forks, under the classifica-
tion of "Bonds and Stocks," a pretended assessment against Defend-
ant in the amount of \$50,000.00 as for the year 1914.

VII.

That when the matter of said pretended assessments for the years 1908 to 1914, both inclusive, so appearing on the assessment roll of said City Assessor came before the Board of Equalization of the City of Grand Forks, Defendant filed with said Board objections
60 and protests to each and all of said pretended assessments which objections and protests were over-ruled.

VIII.

That during the year 1914, and subsequent to the time when said pretended assessments for the years 1908 and 1914,, both inclusive, had been placed on the assessment roll of the said City Assessor, there was placed in the County Auditor's Book or Assessment Roll of property which had escaped taxation, pretended assessments against defendant, under the classification "Bonds and Stocks" in the amount of \$50,000.00 for each of the years 1908 to 1913, both inclusive, and on account of the same alleged property that had previously been attempted to be assessed for the same amounts and for the same years on the assessment roll of said City Assessor.

IX.

That at the time when said pretended assessments were so placed in said County Auditor's Book or Assessment Roll of property which had escaped taxation, said pretended assessments so appearing on the assessment roll of said City Assessor had not been set aside by the judgment of any court, and the alleged property which was attempted to be assessed by said pretended assessments so placed in said County Auditor's Book or Assessment Roll had not then been omitted in the assessment of any previous year or years.

X.

That each and all of said pretended assessments for the years 1908 to 1913, both inclusive, so placed in said County Auditor's Book or Assessment Roll of property which had escaped taxation were made by the tax commission of North Dakota acting through said County Auditor, and were directly made by said Tax Commission.

61

XI.

That when the matter of said pretended assessments for the years 1908 to 1914 both inclusive, so appearing on the assessment roll of the said City Assessor, and the matter of said pretended assessments for the years 1908 to 1913, both inclusive, so appearing in said County Auditor's Book or Assessment Roll of property which had escaped taxation, came before the Board of Review and Equalization of the County of Grand Forks, Defendant filed with said Board

ions and protests to each and all of said pretended assessments, objections and protests were over ruled.

XII.

at thereafter, pretended taxes on account of said pretended assessments so made in 1914 were extended against defendant on tax Lists of the County of Grand Forks, as follows:

the year 1908 the sum of.....	\$3094.00
the year 1909 the sum of.....	3045.00
the year 1910 the sum of.....	2795.00
the year 1911 the sum of.....	3980.00
the year 1912 the sum of.....	3094.00
the year 1913 the sum of.....	3155.00
the year 1914 the sum of.....	3180.00

XIII.

that the defendant's business during all of the times mentioned in the complaint, and herein, and during all of the years 1908 to 1914, both inclusive, was, and now is, the manufacture and sale of breakfast food known as "Cream of Wheat"; that prior to 1908 the defendant duly complied with the laws of the State of Minnesota relating to foreign corporations and obtained a license to transact business in the State of Minnesota; that prior to 1908 Defendant established, and has since continuously maintained and operated a factory for the manufacture of, and sales office for the sale of, said product known as "Cream of Wheat," in the City of Minneapolis, Hennepin Co., Minnesota; that at all times during the years 1908 to 1914, both inclusive, Defendant maintained no factory or sales office other than the factory and sales office aforesaid; that at all times during said years all orders for defendant's said product, "Cream of Wheat," were received by and sent through said Minneapolis factory and sales office of the Defendant, and that for convenience and economy in distribution, Defendant, to fill orders, stored considerable quantities of said product in various Cities of the United States; that during all of said years all books of account of said Defendant were kept at said Minneapolis office of Defendant, and all remittances and payments of money to Defendant were made to and received by said defendant at said Minneapolis office.

XIV.

That at no time during the years 1908 to 1914, both inclusive, did the defendant own or have, and at no time since said years has defendant owned or had any real estate or property of any kind within the state of North Dakota, or any money on deposit there; that during the said years 1908 to 1914, both inclusive, the defendant maintained an office at the First National Bank, of Grand

Forks, but that at no time during any of said years did Defendant transact, and that at no time since said years has defendant transacted, any business of any kind at said office at the said First National Bank, of Grand Forks, or at any place in North Dakota, except that defendant's corporate meetings were held at said office at the said First National Bank of Grand Forks; that for said office so maintained by defendant at said First National Bank

Grand Forks, there was used during all of said times, merely
 63 a portion of the ordinary banking quarters of said Bank and that all fixtures and property of every kind in and about said office at said First National Bank of Grand Forks were, during all of said times, owned by said Bank, and that during all of said times Defendant uses said portion of said banking quarters as such office merely as a favor from said Bank.

XV.

That during all the times mentioned in the complaint, and herein and during all the years from 1908 to 1914, both inclusive, the Defendant had and owned extensive real estate holdings in the State of Minnesota, and a large amount of personal property which was permanently located at said factory in Minneapolis, Minnesota, and at other places beyond the borders of the State of North Dakota, and that during all of said times all of defendant's property of every kind and description was permanently located beyond the border of the State of North Dakota, and all of defendant's business of every kind and nature, excepting the mere holding of corporate meetings, was transacted beyond the borders of the State of North Dakota.

XVI.

That Defendant was assessed and paid taxes for all the years 1908 to 1914, both inclusive, upon all its real estate and personal property in the State of Minnesota, and other states where its said property was located and its said business carried on.

XVII.

That at no time during any of the years 1908 to 1914, both inclusive, did defendant own any bonds or stocks of any kind, or any special franchises.

XVIII.

That each and all of the pretended assessments and taxes
 64 involved in this action were attempted to be assessed and imposed upon Defendant solely under the provisions of Section 2110, Compiled Laws of North Dakota, for 1913, and upon Defendant's own capital stock on account of an alleged value of Defendant's intangible property.

XIX.

That in the case of each and all of the pretended assessments and taxes involved in the present action, there was not made out by any of the assessing and taxing officials any statement as provided for by Section 2110, Compiled Laws of North Dakota for 1913, nor did any of the assessing and taxing officials in the case of any of said pretended assessments and taxes make any computations or calculations as to the various items and amounts which are required to be set forth in the statement provided for by said Section 2110.

XX.

That no part of the taxes mentioned in Finding XII hereof has been paid.

XXI.

That on or about the first day of February, 1916, the Board of County Commissioners of said Grand Forks County, North Dakota passed and adopted a resolution, as follows:

Whereas, personal property of the Cream of Wheat Company, a corporation, has been duly assessed for the years 1908, 1909, 1910, 1911, 1912, 1913, and 1914, and

Whereas, the said Cream of Wheat Company, a corporation has failed and neglected to pay said taxes for said years; and, whereas, there is now due and owing to the County of Grand Forks for such taxes levied and assessed for the year 1908 the sum of \$3094.00, together with accrued interest and penalty thereon; for the year 1909, the sum of \$3,045.00, together with accrued interest and penalty thereon; for the year 1910, the sum of \$2795.00, together with accrued interest and penalty thereon; for the year 1911 the sum of \$3980.00 together with accrued interest and penalty thereon; for the year 1912 the sum of \$3094.00 together with accrued interest and penalty thereon; for the year 1913 the sum of \$3155.00 together with accrued interest and penalty thereon, and for the year 1914 the sum of \$3180.00 together with accrued interest and penalty thereon; and, Whereas, all of such personal property taxes are now delinquent; and, Whereas, the said Cream of Wheat Company, a corporation, does not seem to have tangible property within the State of North Dakota subject to distress and sale, and that it is therefore deemed expedient by the Board of County Commissioners of Grand Forks County to collect such delinquent taxes by action.

Now, therefore, be it resolved: That an action be instituted in the name of Grand Forks County for and on behalf of said County for the collection of all of the aforesaid delinquent personal property taxes, together with all penalty and interest thereon that will accrue up to the time of the determination of said action, and that the State's Attorney of this County be hereby authorized and instructed to commence such action or actions as he may deem fit

for the collection of such taxes in the name and on behalf of said County."

65

XXII.

That at none of the times in said Complaint and herein mentioned has the defendant had any tangible property located within the state of North Dakota.

XXIII.

That the articlees of Incorporation of the defendant designate the City of Grand Forks as the principal place of business of said corporation.

XXIV.

That the Assessment Book of the City Assessor of the City of Grand Forks which contained such pretended assessments for the years 1908 to 1914, both inclusive, so appearing on the assessment roll of the City Assessor of said City of Grand Forks, was duly verified.

From the foregoing Findings of Fact the Court now makes and files the following

Conclusions of Law.

I.

That at no time during any of the period from 1908 to 1914, both inclusive, did the defendant have, nor has it at any time since had, any property of any kind, nature, or description, subject to assessment and taxation within the State of North Dakota.

II.

That each and all of the pretended assessments and taxes involved in this action are illegal, null and void, and that defendant is entitled to judgment declaring the same to be illegal, null and void, and directing that the same be stricken and cancelled from the records of the City and County of Grand Forks, that the plaintiff is not entitled to recover anything in this action, and that defendant

is entitled to judgment against plaintiff for its costs and
66 disbursements herein.

Order for Judgment.

Let Judgment be entered according to the foregoing Findings of Fact and Conclusions of Law.

Dated this 25th day of October, 1917.

By the Court:

CHAS. M. COOLEY, *Judge.*

Endorsed as follows: State of North Dakota, County of Grand Forks. District Court, First Judicial District. County of Grand Forks, &c., Plaintiff, vs. Cream of Wheat Co., Defendant. Findings of Fact, Conclusions of Law, Order for Judgment. 9270. Filed in the office of the Clerk of the District Court, Grand Forks Co., State of North Dakota, at — o'clock — M. Oct. 20, 1917, M. W. Spaulding, Clerk, by —, Deputy.

STATE OF NORTH DAKOTA,
County of Grand Forks:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, STATE OF NORTH DAKOTA, a Municipal Corporation, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, Defendant.

It is hereby stipulated between the parties to the above entitled action that the following is a correct statement of the costs and disbursements taxable in favor of the defendant, to-wit:

Statutory costs:

Before notice of trial	\$5	
After notice of trial, and before trial	3	
Trial	5	
	—	\$13
Additional Clerk's fees		2
		—
Total		\$15

It is further stipulated that said costs may be taxed and allowed in the judgment to be entered in favor of the defendant in said action, without further notice.

Dated this 6th day of November, 1917.

GEO. E. WALLACE,
O. B. BURTNESS,
Attorneys for Plaintiff.
BROWN & GUESMER,
MURPHY & TONER,
Attorneys for Defendant.

The foregoing costs and disbursements are hereby taxed and allowed at \$15.

Dated this 6th day of November, 1917.

M. W. SPAULDING,
Clerk of District Court.

63 STATE OF NORTH DAKOTA,
County of Grand Forks:

District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA,
a Municipal Corporation, Plaintiff,

VS.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Judgment, Nov. 6, 1917.

The above entitled action, having been regularly placed upon the calendar of the above named Court, for the March, 1917 term calendar thereof, came duly on for trial before the Honorable Charles M. Cooley, Judge of said Court, without a jury, on the 29th day of March, 1917, George E. Wallace, Esquire, and O. B. Burtness, Esquire, appearing as counsel for the Plaintiff, and Messrs. Brown & Guesmer and Murphy & Toner appearing as counsel for the Defendant;

And the Court having heard and considered the evidence adduced at said trial, and the arguments of counsel, and being fully advised in the premises, did on the 30th day of October, 1917, duly make and file its Findings of Fact and Conclusions of Law and Order for Judgment herein;

Now, pursuant to said Findings of Fact and Conclusions of Law, and said Order for Judgment, and on motion of Brown & Guesmer and Murphy & Toner, Attorneys for said Defendant,

It is hereby adjudged and decreed, that at no time during any of the period from 1908 to 1914, both inclusive, did the Defendant Cream of Wheat Company have, nor has it at any time since had, any property of any kind, nature or description subject to assessment and taxation within the State of North Dakota;

And it is further adjudged and decreed, that each and all of the pretended assessments and taxes involved in this action are illegal,

70 null and void, and that each and all of the said pretended assessments and taxes are hereby stricken and cancelled from the records of the City and County of Grand Forks; which said assessments and taxes so hereby adjudged to be illegal, null and void and to be stricken and cancelled from the records of the City and County of Grand Forks, are as follows, to-wit:

Each and all of those pretended assessments against Defendant, Cream of Wheat Company, appearing on the 1914 Assessment Roll of the City Assessor of the City of Grand Forks, under the classification of "Bonds and Stocks," in the amount of \$50,000 for each of the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, and,

Each and all of those pretended assessments against Defendant, Cream of Wheat Company appearing in the Grand Forks County Auditor's Book or Assessment Roll of property which had escaped

ation, under the classification "Bonds and Stocks," in the amount \$50,000 for each of the years 1908 to 1913, both inclusive, and, Each and all of those pretended taxes on account of said pretended assessments, which taxes were extended against Defendant Cream of Wheat Company on the Tax List of the County of Grand Forks, as follows:

for the year 1908 the sum of	\$3,094.00
for the year 1909 the sum of	3,045.00
for the year 1910 the sum of	2,795.00
for the year 1911 the sum of	3,980.00
for the year 1912 the sum of	3,094.00
for the year 1913 the sum of	3,155.00
for the year 1914 the sum of	3,180.00

And it is further adjudged and decreed, that Plaintiff is not entitled to recover anything in this action and that Defendant recover of the Plaintiff the sum of Fifteen Dollars as its costs and disbursements as taxed and allowed.

Witness the Honorable Charles M. Cooley, Judge, in and for said County, and my hand and seal, this 6th day of November, 1917.
By the Court:

[Seal of District Court, County of Grand Forks, State of North Dakota.]

M. W. SPAULDING,
Clerk of the District Court.

(See reverse side.)

[Endorsed:] Filed in the office of the Clerk of the District Court, Grand Forks Co., State of North Dakota, at — o'clock — M. Nov. 6, 1917. M. W. Spaulding, Clerk, by — —, Deputy.

71 Endorsed as follows: District Court, — Judicial District. County of —, North Dakota, Plaintiff, vs. —, Defendant. Murphy & Toner, First National Bank Building, Grand Forks, N. Dak., Attorneys for —. 9270, 6594. Filed in the office of the Clerk of the District Court, Grand Forks Co., State of North Dakota, at 4 o'clock P. M. Nov. 6, 1917. M. W. Spaulding, Clerk, by — —, Deputy. 3499. Filed in the office of the Clerk of Supreme Court, State of North Dakota, Jan. 15, 1917. Due service of the within — admitted on us this — day of —, A. D. 191—, at Grand Forks City and County, North Dakota. — —, Attorney for —. Book 21-570.

STATE OF NORTH DAKOTA,
County of Grand Forks:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Statement of the Case.

Geo. E. Wallace, O. B. Burtness and Theo. B. Elton, Attorneys
for Plaintiff.

Brown & Guesmer and Harry S. Carson and Murphy & Toner,
Attorneys for Defendant.

Original.

73 STATE OF NORTH DAKOTA,
County of Grand Forks, ss:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation.

Judge's Certificate to Statement of Case.

STATE OF NORTH DAKOTA.
County of Grand Forks:

I, Charles M. Cooley, Judge of the District Court of the First
Judicial District of the State of North Dakota, and the judge before
whom the above entitled action was tried, do hereby certify that the
foregoing and annexed transcript is a true and correct transcript of
evidence of all proceedings had and made matter of record upon the
trial thereof, and do further certify that the hereunto annexed
plaintiff's exhibits 10 and 14, and defendant's exhibit B, are the
original exhibits and the whole thereof offered and received upon
the trial of said action, that papers marked plaintiff's exhibits 1,
2, 3, 4, 5, 6, 7, 11 and 12 and paper marked defendant's exhibit A,
are true and correct copies of the original exhibits received

upon the trial of said action, that plaintiff's exhibits 8, 9 and 13 are fully quoted and set out in the statement of the case at pages indicated on the summary of exhibits.
I further certify that the hereunto annexed demand of the plaintiff for the defendant to produce certain of its corporate records is the original on file in this court, I do hereby further certify that all of the foregoing and the whole thereof as the same is hereto attached is hereby settled and allowed as a statement of the case in such action and made a part of the judgment roll therein, including the specifications of questions of fact to be reviewed by the supreme court.

Dated this 2nd day of January, 1918.

CHAS. M. COOLEY, *Judge.*

STATE OF NORTH DAKOTA,
County of Grand Forks, ss:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiff and defendant in the above entitled action that the record hereto attached may be settled and allowed by the Judge of the District Court as a statement of the case, without further notice, and that the exhibits may be certified to in accordance with the notations in the summary hereto annexed showing where same may be found. This stipulation however does not waive right defendant might otherwise have to have all facts in the record reviewed.

Dated this 6th day of December, 1917.

GEO. E. WALLACE,

O. B. BURTNESS,

THEO. B. ELTON,

Attorneys for Plaintiff.

BROWN & GUESMER &

HARRY S. CARSON,

MURPHY & TONER,

Attorneys for Defendant.

76

Summary of Exhibits and How Found.

- Plaintiff's Exhibit 1—Page 18, Book A, of property Escaped Taxation and slips attached. (Copy Attached.)
- “ “ 2—Page 92 of 1914 Assessment Book, Vol. 4, Personal Property. (Copy Attached.)
- “ “ 3—Page 96, same record. (Copy Attached.)
- “ “ 4—Certificate of W. H. Alexander in Vol. 5, 1914 Assessment book, personal property. (Copy attached.)
- “ “ 5—Assessor's Return Oath, same record. (Copy Attached.)
- “ “ 6—Certificate of W. H. Alexander Vol. 4, 1914 Assessment book, personal property. (Copy Attached.)
- “ “ 7—Assessor's Return Oath, Vol. 4. (Copy Attached.)
- “ “ 8—Page 93 of Commissioner's Proceedings, Vol. 9. (Found on Page 11, Statement of Case.)
- “ “ 9—Page 95, same record. (Found on Page 11, Statement of Case.)
- “ “ 10—Protest Cream of Wheat Co., to County Reassessments. (Original Attached.)

77

- Plaintiff's Exhibit 11—Item No. 7, Page 92, of 1914 Tax List for City of Grand Forks. (Copy Attached.)
- “ “ 12—All of Page 96, same record. (Copy Attached.)
- “ “ 13—Part of Page 153, Minutes of City Board of Equalization. (Found on Page 17 of Statement of Case.)
- “ “ 14—Protest of Cream of Wheat Company filed with City Board of Equalization. (Original Attached.)
- Defendant's “ A—Certificate of Secretary of State of Minnesota, that Cream of Wheat Company has been admitted to do business in Minnesota as a foreign corporation. (Copy Attached.)
- “ “ B—Summary of Taxes paid by Cream of Wheat Company in other jurisdictions. (Original Attached.)

Index.

Plaintiff's witnesses:

	D.	C.	R. D.	R. C.
H. Alexander	16	21	28	30
			31	31
J. Londergan	32	35	45	

Defendant's witnesses:

G. Brown	54	80		
ans Anderson	68	74	76	78

STATE OF NORTH DAKOTA,
County of Grand Forks, ss:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff,

VS.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

Questions of Fact to be Reviewed on Appeal.

The following facts, among others, were found by the District Court, which the plaintiff desires reviewed on appeal to the Supreme Court, and the reasons therefor will be more fully set forth in the Notice of Appeal, to-wit:

1. That in neither or any of the years 1908, 1909, 1910, 1911, 1912 or 1913 was any property of the defendant assessed or attempted to be assessed for taxation, or taxed, in the State of North Dakota.

2. That each and all of said pretended assessments for said years so placed upon the assessment roll of said city assessor were made by the tax commission of North Dakota, acting through the city assessor, and were directly made by said tax commission.

3. The alleged property which was attempted to be assessed by said pretended assessments, so placed in said county auditor's book, or assessment roll, had not then been omitted in the assessment of any previous year or years.

4. That each and all of said pretended assessments for the years 1908 to 1913, both inclusive, so placed in said county auditor's book, or assessment roll of property which had escaped taxation were made by the Tax Commission of North Dakota, acting through said county auditor, and were directly made by said Tax Commission.

5. That during all of said times all of defendant's property of every kind and description was permanently located beyond the borders of the State of North Dakota.

6. That at no time during any of the years 1908 to 1914, both inclusive did defendant own any bonds or stocks of any kind.

7. That each and all of the pretended assessments and taxes involved in this action were attempted to be assessed and imposed solely under the provisions of Section 2110 of the Compiled Laws of North Dakota for 1913, and upon defendant's own capital stock on account of an alleged value of defendant's intangible property.

81 As to the last question to be reviewed the plaintiff admits that the assessments were made under Section 2110 and desires a review of the balance of the Finding.

82 STATE OF NORTH DAKOTA,
County of Grand Forks:

In District Court, First Judicial District.

COUNTY OF GRAND FORKS, Plaintiff,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant.

The above entitled cause came duly and regularly on to be tried at Chambers in the courthouse in the City and County of Grand Forks, in the First Judicial District of the State of North Dakota, on March 29, 1917, before the Honorable Charles M. Cooley, Judge without a jury, McIntyre & Burtness and George E. Wallace appearing as attorneys for plaintiff, and Brown & Guesmer and Harry S. Carson and Murphy & Toner appearing as attorneys for defendant.

Whereupon the following testimony was adduced and proceeding had, to-wit:

Mr. Burtness: I will ask to have this page marked as an exhibit.

Exhibit 1 is marked for identification, being page 18 of assessment roll.

Mr. Burtness: The plaintiff offers in evidence plaintiff's exhibit 1, the same being page 18 of the records of the county auditor of Grand Forks county, North Dakota, of Book A of the book containing property escaped from taxation.

83 Mr. Carson: Do I understand that you offer, as a part of that page, the six slips that are pinned thereon, or not?

Mr. Burtness: No, just the page.

Mr. Brown: I think that the record will show as we have talked here. I want to be fair, but I want to be cautious. I don't want the statements that I made to be construed as an admission upon our part, that the method that was required for any assessment under 2110 was properly followed. I am simply admitting now that the amounts that were put down on there under section 2110, were simply put there as being the amounts purporting to show—to be the result of the assessment under 2110, but we deny that they are. In other words, it is either that or nothing.

Mr. Wallace: Sure.

Mr. Brown: We object to this on the ground that it is immaterial incompetent and no proper foundation laid. I am only saving the point. I don't deny that these are the books, and I don't deny that these marks are on the books; that isn't it. I mean no foundation to go into evidence here, the books—even if the books are proven, that we are bound by this item, nor are we bound by this assessment, this attempted assessment put in this way as appears on page 18 of that book, because I claim that while the amount is put down, that no foundation has been laid under the statute to show that there was any warrant to put that amount down.

Mr. Burtness: Can't you make your objection this: It is conceded that the book constitutes one of the records of the county offices and so forth and so on.

Mr. Brown: Sure, we admit that book, that is, that is the regular assessment book, is one of the books of the county auditor's office, and we don't deny that the item appears in writing as you read it from the book.

Mr. Wallace: Your idea is then that irrespective of what might be introduced in evidence, *that* there is no tax any way?

Mr. Brown: Sure. I don't object to the competency of these books, that is, I don't dispute their authenticity, or of the records of the county auditor's office and that these amounts appear in writing on the books as they so record.

Mr. Burtness: I don't know, your honor, whether you would prefer to have these matters read into the record now or not.

The Court: Now, if you are going to get a transcript of this proceeding, and I presume you will—

Mr. Brown: I will say to the court and to the attorneys, that this case will never be submitted to as against us until it has gone through the United States supreme court.

The Court: I presume which ever side gets beat will appeal in this case and you might just as well have a transcript—if you are going to have a transcript it seems to me it would be better to read into the record those things; that will obviate a lot of exhibits to be attached, because if you get a transcript you will have to get certified copies of these things, and now if you read them in you will have a transcript of the whole thing.

Mr. Burtness: I agree heartily with the court in that matter. The only objection, it is just a little difficult to read in the title and subdivisions and printed matter and matters of that sort. I don't know but what it will be easier afterwards to get the copies of the exhibits made.

Will you object to this stipulation: It is agreed and stipulated that copies may be prepared of these pages and substituted in lieu of the originals.

The Court: All documentary evidence that is offered here, that copies may be made and substituted in the record for the originals.

Mr. Carson: I think we had better make the further objection to exhibit 1, on the ground that it is an attempt to introduce in the record only part of the document in this, page 18 on its face specific-

ally refers, in the seventh column thereof, in the case of each of these entries, in this language: these assessor's slips—to certain slips now pinned on this page 18 and which by the very terms of this page 18 are a part of any attempted assessment which the county auditor may have made as indicated on page 18. Make that further ground of objection to plaintiff's offer of page 18, of book A, auditor's escape record. I understood that the offer was only page 18 exclusive of the slips as originally made.

Mr. Wallace: Well, so far as that it concerned, we will offer the slips also.

Mr. Carson: We further object to the offer of this page 18 on the ground that under the statute of North Dakota the county auditor under those circumstances has no power to make assessment on intangible property, it having been admitted at the opening of the case that any attempted assessment in this case was based on the claimed value of defendant's capital stock under section 2110, compiled laws of North Dakota, 1913; the point in that connection being that under the statutes the auditor has power, if at all, to back 86 assess only real property or tangible personal property; and in connection with the record we also make the further objection that this page 18 of book A, that the auditor's escaped property record shows on its face that at the time this attempted assessment was made by the county auditor, that an assessment had been made by the city assessor, that fact is shown by the six slips which are pinned onto this page 18 and which have now been offered as a part of page 18; the point in this connection being that if the auditor has any power whatever to back assess property, even intangible, he can do it only under two circumstances, that is, when it has been omitted in the assessment of previous years or when judgment for tax has been set aside by the court. Those are the only two conditions, neither one of them existing in this case, because the records show that the assessment had been made by the city assessor of Grand Forks and no showing that it has been set aside by the court, and the objection is that the auditor, neither of the two conditions existing, had no authority to make the assessment; and the further ground of objection that any attempted assessment by the county auditor deprives this company of its property without due process of law, contrary to both the federal and state constitutions in that there is no provision whatever giving notice to the fact, especially as to back assessment and the attempted assessment for the omitted years.

Exhibit 2 is marked for identification.

Mr. Burtress: Plaintiff offers in evidence plaintiff's exhibit 2, the same being page 92 of the 1914 assessment book, volume 4, containing taxation of personal property in the City of Grand Forks, 87 North Dakota, which record is one of the records kept in due course of business and now on file in the office of the county auditor of Grand Forks county, and particularly to the 7th item appearing on said page relating to the assessment of the Cream of

heat company, showing an attempted assessment against said company under the item "Bonds and Stock other than Bank Stock" in sum of \$50,000.00.

Mr. Brown: It is admitted, is it, the same as the other was, that there is an attempted assessment under section 2110 assessing in-eligible value, Mr. Burtness?

Mr. Burtness: Yes.

Mr. Brown: We object to the introduction of this record on the ground it being admitted that this is an attempt to assess this company on the claimed value of its capital stock under section 2110 we object to the introduction of this record in evidence on the ground that it is not accompanied by any proof that the assessor has made out the special statement required under section 2110.

Exhibit 3 is marked for identification.

Mr. Burtness: Plaintiff offers in evidence plaintiff's exhibit 3, the same being page 96 of the same book referred to in the offer of plaintiff's exhibit 2, the same tending to show an assessment against the defendant Cream of Wheat Company for the years 1908, 1909, 1910, 1911, 1912, 1913, and 1914 as set out in such exhibit.

Mr. Brown: What years you only claim was a carrying forward of the books of this assessment other than already been spoken of as back assessment?

Mr. Burtness: The record shows for itself.

Mr. Carson: We object to the introduction of this page 96 and the entries thereon, on the ground that it purports to be an attempted assessment by the city assessor of Grand Forks for the years other than the current year of 1914; in other words, an attempt by the city assessor to assess property as having been omitted from taxation, and on the ground that the city assessor or the State of North Dakota has no authority to make such assessment; and on the other ground that it is not admissible under the pleadings.

Mr. Carson: May it please the court, we would like to enter a further objection, or a further ground of objection to the offer of plaintiff's exhibits 2 and 3, and each of them, on the ground—in the first place I would like to ask counsel whether at the same time when they offered in evidence pages 92 and pages 96 of the personal property assessment book of the city assessor of Grand Forks for the year 1914, whether at the same time they offered in evidence as a part of those two pages, the attempted affidavit appearing on the last page of this book?

Mr. Burtness: That wasn't included in the offer as made.

Mr. Carson: Do I understand that the offer is made without the affidavit being offered simultaneously?

Mr. Burtness: It has so been made.

Mr. Carson: I object to the introduction in evidence of these two pages, 92 and 96, and each of them, on the ground that there is no showing that the attempted assessment was accompanied by any affidavit of the city assessor as required by the laws of North Dakota, the assessment roll in that connection showing on its face

89 when offered is wholly confined to those pages, that the assessment is void.

Mr. Toner: You might add to that objection the further objection that the certificate, whether signed or unsigned, is not in the form provided by law, or substantially in that form.

Mr. Carson: The objection as now made is to those pages because they are not accompanied by any form of affidavit or attempted affidavit even, as required by law.

Mr. Burtness: May it be understood that the personal property assessment of the City of Grand Forks for the year 1914 is listed in the two books, the same being books 4 and 5 of such year?

Mr. Carson: Yes, we will admit the entire assessment of personal property for the City of Grand Forks for the year 1914, the assessment roll is contained in two volumes, the one being designated 1914 assessment book, personal, number 5, Grand Forks county and the other being designated 1914 assessment book, personal, number 4, Grand Forks county, the same being records of the city assessor of Grand Forks, it being further understood as a condition of the admission that the attempted assessment by the city assessor of Grand Forks against this defendant appears only in volume 4, and we renew the objection made to the offer of the two pages, that pages 92 and 96 of this volume, on the ground that it is not accompanied by any affidavit of the assessor as required by law.

Exhibits 4 and 5 are marked for identification.

Mr. Burtness: Plaintiff now offers in evidence plaintiff's exhibit 4, the same purporting to be the certificate of W. H. Alexander, city auditor of the city of Grand Forks, dated June 2, 1914, being posted to assessment book 5, the said book listing the property in the City of Grand Forks for assessment for the year 1914.

Mr. Carson: We object to that as irrelevant and immaterial, on the ground too that it has no bearing on the issues in this case, in connection whatever so far as the objection to a lack of an affidavit or assessment—as far as the lack of an affidavit is concerned on the personal property assessment book number 4, on which these attempted assessments by the city assessor appear.

Mr. Burtness: Plaintiff offers in evidence plaintiff's exhibit 5, the same purporting to be the assessor's return oath found on the last page of assessment book 5 of the City of Grand Forks for the year 1914.

Mr. Carson: Object to that on the ground that it is immaterial on the further ground that the certificate attached to book 5 does not purport on its face to verify or identify or cover book 4.

Exhibits 6 and 7 are marked for identification.

Mr. Burtness: Plaintiff now offers in evidence plaintiff's exhibit 6, the same purporting to be the certificate of W. H. Alexander, city auditor, similar in wording to plaintiff's exhibit 4, but being pasted in at the beginning of book 4 of the assessment book of personal property for the City of Grand Forks for the year 1914.

Mr. Carson: We have no objection.

Mr. Burtness: Plaintiff offers in evidence plaintiff's exhibit 7, the same purporting to be the assessor's return oath, found at the end of book 4, containing part of the personal property assessment of the City of Grand Forks for the year 1914 heretofore returned, it being stipulated by the plaintiff that the signature of M. J. Londergan now contained therein was made this morning, to-wit: March 29, 1917, at his request, but that the signature and seal of W. H. Alexander, City Auditor of Grand Forks city was attached thereto on the date purported, to-wit: June 1, 1914.

Mr. Carson: Well, you will admit that Mr. Londergan is no longer city assessor of the City of Grand Forks.

Mr. Burtness: Plaintiff concedes that Mr. Londergan is not now the city assessor of Grand Forks city.

Mr. Brown: And has not been since what date?

Mr. Burtness: I will be perfectly glad to stipulate whatever date we ascertain, but I don't know now.

The Court: He hasn't been within the last six months anyway.

Mr. Carson: And that he has not been such city assessor for the last six months.

Mr. Carson: The defendant objects to the introduction of this exhibit 7, on the ground that it shows on its face that no affidavit was made by the city assessor at the time it was filed; on the further ground—object to it on the ground that the record when it was filed with the city assessor and at no time until March 29, 1917, did it contain any signature or affidavit by the city assessor and has never been accompanied by an affidavit as required by law. And also on the further ground that it shows on its face that the assessor did not in fact swear to this particular book 4, personal property assessment book, in which these attempted assessments against the defendant appear.

92 Mr. Burtness: On that admission of the assessor there, I have refreshed my memory—that he has not been such assessor since 1915.

Exhibits 8 and 9 are marked for identification.

Mr. Burtness: Plaintiff offers in evidence plaintiff's exhibit 8, the same being part of page 93, contained in one of the records kept in the office of the county auditor of Grand Forks county, marked "Commissioners' Proceedings No. 9" and which is in fact part of the minutes of the meeting of the Board of County Commissioners of Grand Forks county sitting as a Board of equalization of said county on July 11, 1914, the part so offered reading as follows:

"2 o'clock P. M. The board met pursuant to adjournment. Present: Chairman Udenby; Commissioners Donovan, Pupore and Haddow. Absent, Commissioner Mooney. No change was made by the board from the assessor's returns on bonds and stocks other than bank stock."

Mr. Carson: We have no objection to the introduction of that.

Mr. Burtness: Plaintiff offers in evidence plaintiff's exhibit 9, the same being part of page 95 of the same record referred to in the offer

of plaintiff's exhibit 8 and being the minutes kept of the records of the board of County Commissioners sitting as a board of equalization on July 15, 1914, the part specifically offered reading as follows:

"On motion of Mr. Haddow, seconded by Mr. Donovan, the board proceeded to equalize property of the Cream of Wheat company as assessed by the county auditor that had escaped taxation, and adjusted the same as follows:

92½ "For the following years, viz.: on bonds and stock, other than bank stock:

1908	.....	\$50,000.00
1909	.....	50,000.00
1910	.....	50,000.00
1911	.....	50,000.00
1912	.....	50,000.00
1913	.....	50,000.00

"All members present voted yes."

Mr. Carson: We object to that on the ground that it is incompetent, irrelevant and immaterial for all of the reasons which we urged in the objection to any attempted assessment by the county auditor and also on the further ground that it is not accompanied by any showing as to the circumstances under which the equalization was made, as to whether there was in fact anything before the board at the time the attempted equalization was made.

Exhibit 10 is marked for identification.

Mr. Burtness: Plaintiff offers in evidence plaintiff's exhibit 10, the same purporting to be protest signed by the Cream of Wheat company, by Brown — Guessner, its attorneys, dated July 11, 1914 and filed in the office of the county auditor on July 11, 1914, marked on the manuscript cover enclosing the same "Protest to assessment of stock of the Cream of Wheat company" and marked as a document number 1446 of the files of the auditor's office.

Mr. Carson: No objection.

Mr. Brown: You offer this as the protest that was put in upon which the records previously read show the action taken by 93 the board later?

Mr. Burtness: It being stipulated that such protest was before the board of equalization at the time that the minutes, plaintiff's exhibits 8 and 9, were made, and related to the assessments attempted to be equalized by the board at that time.

Mr. Carson: I don't know that we will admit that the Grand Forks commissioners had that protest before them at the time, but we will admit that this is the protest.

Mr. Brown: We admit that this was the protest that was before the board at that time. We agree to it to the extent that we admit that it was the protest before the board at that time and that we filed it on behalf of the Cream of Wheat company in order to take the necessary steps required by the statute to have a standing in court if we were turned down.

Mr. Burtness: There is no objection then I take it to the stipulation that was put on the record.

Mr. Carson: I don't know that we will admit that they had that test before them and considered it at that time. We will admit that they had it on that date. I don't know that we will admit that the commissioners had it before them and considered it at that time.

Mr. Brown: Oh, we will take the stipulation as it stands.

Mr. Burtness: I wonder if this stipulation can be made: It is stipulated that the assessments as returned by the county board of equalization and as equalized by such board, were duly certified to the state board of equalization and returned by the state board of equalization to the proper officers of Grand Forks county with no change insofar as the assessments involved in this litigation is concerned.

Mr. Carson: We will admit that, but of course saving all objections to the legality of the attempted assessments or any of them, the admission being merely that it was certified to the state board of equalization and returned by them to the county auditor without any change.

Exhibits 11 and 12 are marked for identification.

Mr. Burtness: Plaintiff offers in evidence plaintiff's exhibit 11, the same being page 92 of records of the office of the county auditor of Grand Forks county, such record being marked "1914 tax list, City of Grand Forks, Personal Property," and particularly that item found on such page relating to the purported assessment of the Cream of Wheat company of the City of Grand Forks, the same being item numbered 7 upon such page, and purporting to show that taxes were extended upon an assessment against such Cream of Wheat Company, the total valuation being \$50,000.00, and the tax assessed thereupon being \$3180.00, the same being the assessment for the year 1914.

Mr. Carson: We object to that on the same grounds as the attempted assessment by the city assessor was objected to.

Mr. Burtness: Plaintiff offers in evidence plaintiff's exhibit 12, the same being all of page 96 of the same record referred to and containing plaintiff's exhibit 11, purporting to relate to Cream of Wheat assessments for the years 1908, 1909, 1910, 1911, 1912 and 1913, all of which are based upon a valuation of \$50,000.00, such being the valuation placed on each of said years, and purporting to show that taxes have been extended against such valuations in the

following amounts for such respective years:

For the year 1908 a tax in the sum of	\$3,094.00
" " " 1909 " " " " " "	3,045.00
" " " 1910 " " " " " "	2,795.00
" " " 1911 " " " " " "	2,980.00
" " " 1912 " " " " " "	3,094.00
" " " 1913 " " " " " "	3,155.00

Making a total tax extended for the years 1908 to 1913, inclusive in the sum of \$18,163.00

Mr. Carson: We object to the introduction of this exhibit in evidence on all of the same objections which were interposed to the attempted assessment by the city assessor for these years, and also on all of the same grounds as were interposed as grounds of objection to the attempted assessment by the county auditor for those years. Also on the further ground that there is no showing at this time in the record that any steps have been taken to impose a legal tax against this company.

Mr. Burtness: May it be stipulated that the pretended taxes as extended by exhibits 11 and 12 have not been paid by the Cream of Wheat Company?

Mr. Brown: It may, and neglected and refused though often demanded.

Mr. Burtness: May it also be stipulated that on February 2, 1916 the board of county commissioners of Grand Forks county passed the resolution set out in paragraph five of the plaintiff's complaint.

Mr. Carson: Yes, and may I have permission at this time to add a further ground of objection to the tax list, particularly item 96 7 of page 92, being offered as plaintiff's exhibit 11, the further ground of objection at this time being that there is no showing that the proper steps have been taken under the laws of North Dakota so that a legal tax could be entered against the company, the proceedings being defective and being entirely insufficient to authorize the extension of any tax so far as this record shows.

Mr. Burtness: Did you intend that that should be applied to 1 also?

Mr. Carson: I didn't specifically make the ground to exhibit 12 but I will ask permission at this time to extend the same objection to plaintiff's exhibit 12.

Mr. Burtness: I believe, your honor, that that is practically the plaintiff's case, except—I didn't think we would get through as early as this, I didn't make arrangements with one or two officials of the City of Grand Forks—they aren't here, but they will be here at two o'clock, or such time as your honor adjourns to. There are one or two city records that we would like to introduce, otherwise we are through with the plaintiff's case.

Adjournment is now taken until 2 o'clock, p. m.

2 o'clock, p. m., court convened pursuant to adjournment.

W. H. ALEXANDER, being first duly sworn, testified as follows:

Direct examination.

By Mr. Burtness:

Q. You may state your name?

A. W. H. Alexander.

Q. And your residence?

A. Grand Forks.

Q. Do you occupy any official position in the City of Grand Forks or County of Grand Forks?

A. City Auditor.

Q. City Auditor of the City of Grand Forks, Grand Forks county, North Dakota?

A. Yes.

Q. And how long have you been such City Auditor?

A. Three years the 1st of May, 1917.

Q. Since May 1st, 1914, then?

A. Yes.

Q. And continuously during that period?

A. Continuously, yes.

Q. Did you act as City Auditor or as clerk of the city board of Equalization and review during the year 1914?

A. Yes.

Q. And have you in your possession as City Auditor of Grand Forks city the minutes of the proceedings of such board?

A. Yes.

Q. Will you produce it please?

(Witness hands book to counsel.)

Exhibit 13 is marked for identification.

Q. I show you plaintiff's exhibit 13, the same being the top of page 153 of the record which you have produced, the record being marked "Record of City Board of Equalization" and ask you whether or not those are the minutes made at the meeting of the City Board of Equalization of Grand Forks City on or about June 20, 1914?

A. Yes, that is the record.

Mr. Burtness: Plaintiff now offers in evidence plaintiff's exhibit 13, the same being the part of the minutes of the City Board of Equalization and Review of Grand Forks city, under date of June 20, 1914, the part offered reading as follows:

"Cream of Wheat Protest.

"Messrs. Brown & Guessner, attorneys for the Cream of Wheat Company, filed a protest against the assessment returned by the assessor in the amount of \$50,000.00 each year for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, a total assessment of \$350,000.00, under number 21 (Bonds and Stocks) asking that the said assessment be annulled and cancelled, claiming the said company had no taxable property in Grand Forks city, presented, read. Moved by Alderman Turner, seconded by Alderman Vallely, that the protest be received and filed, and that the assessment against the Cream of Wheat Company as returned by the city assessor and reviewed and equalized by the board of equalization be approved and confirmed. Carried. Thirteen votes affirmed."

Mr. Carson: The defendant objects to the offer on the grounds and reasons as were interposed to the attempted assessment by the city assessor—attempted assessment in 1914 by the city assessor and the attempted assessment by the city assessor for the years 1908 to 1913 inclusive; on the further ground that there was no law in law which could be equalized at that time.

Mr. Burtness: There is no objection to the foundation or competency at all.

Mr. Carson: No.

Q. Are you in possession, Mr. Alexander, of the protest of the Cream of Wheat Company, by Brown & Guessner, its attorneys, referred to in these minutes, plaintiff's exhibit 13?

A. It is in that book there I guess.

Exhibit 14 is marked for identification.

Q. Is plaintiff's exhibit 14 such protest?

A. Yes, that is the protest filed on June 20, 1914.

Mr. Burtness: Plaintiff offers in evidence plaintiff's exhibit 14.

Mr. Carson: No objection, and let the record show that protest was filed by the Cream of Wheat Company by Brown & Guessner, its attorneys, and was filed on June 20, 1914. That is admitted I suppose.

Mr. Burtness: Yes, the exhibit shows that.

Q. I take it then, Mr. Alexander, that you are the person who signed certificate, plaintiff's exhibit 6, as city auditor of Grand Forks, are you not?

A. Yes.

Q. I will also ask you if you are the person who, as auditor of Grand Forks city, signed your name on the line found at the bottom—towards the bottom of plaintiff's exhibit 7?

A. Yes.

Q. Being the jurat to a purported oath by one M. J. Londergan?

A. Yes.

Q. It appears from the evidence in this case, Mr. Alexander, that the name "M. J. Londergan" was not written in on the line immediately above the jurat until today. What is your recollection of the matter with reference to administering the oath to Mr. Londergan on this oath?

Mr. Brown: Objected to as incompetent, immaterial and irrelevant, on the ground that it is purporting to show or contradict written instrument by parole evidence.

Mr. Toner: I would like to ask the witness a question for the purpose of laying foundation for an objection.

By Mr. Toner:

Q. Have you any independent recollection as to the matter at this time?

A. Yes I have.

Q. You have an independent recollection independent of the records?

A. Yes, I have a recollection of how this was done.

Mr. Toner: All right.

Mr. Brown: Renew the objection.

(The original question is read to the witness.) A. Well, he reported to me that the assessment books were ready to turn over and I took my seal and went into the assessor's office across the hall and administered the oath to Mr. Londergan, the city assessor of Grand Forks, and as usually the case I wouldn't swear that I administered each oath individually, however I do know that I asked him if he acknowledged the same oath probably on each book, and he was signing and I was signing at the same time; the books was in his office, I had my seal there and I was putting my seal on.

Q. That is, you mean you don't know whether you asked him specifically as to each and every individual oath that is found upon all of the assessment books that were used at that time?

A. Well, I gave—I remember I certainly gave him the oath and asked—I took it for granted that it applied probably to all these books. I might not have stood over him and watched him sign each book at the time.

Q. But the same oath was contained in how many different books at that time, Mr. Alexander?

A. The three real estate books and the two personal books that was there.

Q. And I will call your attention to the oath—assessor's return oath on plaintiff's exhibit 5, Mr. Alexander, and ask you what is your recollection with reference to your signing plaintiff's exhibit 5 with reference to it being or not being the same time—done at the same time as you signed plaintiff's exhibit 7?

A. These books were all open on a long table and I signed these books one after the other, the assessor along standing with me and might be he was called away for a minute to telephone or something, I don't know. I suppose they were all signed—or fourse, he was signing some ahead of me and maybe I went along and signed one with the presumption that they were signed. The books were there on a long table.

Q. If I understand you correctly then, these signatures of yours were put on immediately following the administering of the general oath to Mr. Londergan?

A. Yes, I signed them and sealed them right away, of course we were both signing there as a matter of fact.

Mr. Burtness: You may cross examine.

Cross-examination.

By Mr. Brown:

Q. I will call your attention to exhibit 7, the signature on that M. J. Londergan was made on March 29, 1917, wasn't it?

A. I don't know.

Q. Well, it is admitted here——

A. That is the first time I ever knew it wasn't there the day that I signed it.

Q. Well, it is admitted in this case by the city that that signature "M. J. Londergan" on plaintiff's exhibit 7 was written on there, and the ink shows it, March 29, 1917.

A. I see that that shows so there.

Q. That is an established fact in this case. Now that being the case—for answer you can admit that that is the case, then you signed your affidavit as it appears here, W. H. Alexander, auditor of Grand Forks city, you signed that without Mr. Londergan having signed the affidavit?

A. Why, it would seem so now, but of course in signing up five books like this and all lying on the table and doing it together I supposed the books were all signed. I seen him sign some
102 of them.

Q. Now, when were the words first of June, 1914, on the next line—first is in writing and June is in writing and the figure "4" is in writing. Was that on there when you signed lacking fourteen?

A. Yes, I think that was on there.

Q. I call your attention to the fact that it is in the same ink as the signature of Londergan?

Mr. Burtness: Objected to as improper cross-examination, a plain and apparent attempt on the part of counsel to confuse the witness and absolutely a misstatement of fact, and assumes facts not in evidence in this case.

Q. I notice that the affidavit which you took and which is over your signature contains the words "subscribed and sworn to before me this first day of June, 1914." If he hadn't subscribed at the time you signed that and did not subscribe until March 29, 1917, the does that agree with any recollection that you have?

A. Well, I administered the oath to Mr. Londergan, city assessor, and the books were all laid out on the table and I said as I do in all administer all oaths, I says "do you subscribe to the truths in these books" and he went on signing and I signing and putting my seal on.

Q. Some of them he signed before you put your signature down as the swearing officer and some of them you signed after you yourself did it?

A. That case shows there that he hadn't signed it.

Q. As a matter of practice you signed up the affidavits and he came along afterwards and signed?

A. Well, we signed them together and I supposed he signed them all, but I see that one——

Q. You have an independent recollection you say of administering the oath to him?
103

A. I have a recollection of going into his office, that is with my seal, and administering that oath in the back of those books to him and asking him if he subscribed to the oath in all these books.

if he subscribed to the same oath that was contained in all the assessment books.

Q. Following now this independent recollection which you say you have, what were the words of the oath that you administered, as near as you can recall it?

A. I presume I put that oath to him the first thing, I went in there, opened one of the books and read that oath to him.

Q. The oath as written on here simply says the words "subscribed and sworn to before me"?

A. I asked him——

Mr. Burtness: Objected to as an improper statement of fact and therefore an improper question, not based upon any evidence in this case.

Q. Well, what he swears is written out. Now then the signature of the swearing officer says "subscribed and sworn to before me." Well, all, in substance, practically all you said to Londergan was "do you swear to these"?

A. No, I read one of those oaths there in one of those books.

Q. The whole thing?

A. Yes.

Q. And you asked him if he subscribed and swore to it?

A. Yes, I certainly wouldn't take a man's acknowledgement without reading the oath to him under any conditions.

Q. Well that is frequent practice nevertheless?

A. Well, I haven't done so. I have sworn some men, policemen, taking the oath of office, four or five of them, read the oath to one of them and several standing there and asked them if they
104 subscribed to it. I have done that.

Q. Have you refreshed your recollection since yesterday, Mr. Alexander?

A. No, sir.

Q. You had some conversation yesterday with Mr. Toner?

A. I did, yes sir.

Q. In regard to what you did at that time and what your independent recollection was?

A. I beg your pardon, I didn't tell Mr. Toner that I didn't have an independent recollection as to what I did at that time. I was talking with Mr. Toner and I presume he was talking about the time that I certified to the oath in the front of the book at the county auditor's office, and I misunderstood entirely if Mr. Toner thought that that was what I was referring to; I was referring to this front sheet; we were talking about this front certificate in the books here. That was what I referred to.

Q. With reference to what you told him you didn't have any independent recollection?

A. I knew that I furnished a certificate and I told him—whether the assessment was in the office at the time that I signed this certificate I couldn't swear to whether the city assessor was over here, the best of my recollection was he wasn't when I furnished this

certificate. I mind Mr. Toner saying something about the assessment and I was figuring on the time, the time I came over and fixed the certificate up in the county auditor's office, because we had been talking about that certificate before that.

Q. At the time of this meeting of the city equalization board understand you were clerk of that board?

A. Yes.

Q. You were present?

A. Yes.

105 Q. Did you make up the records?

A. Yes.

Q. That have been put in evidence here?

A. Yes.

Q. Those are the correct records, are they?

A. Yes.

Q. They recite, in substance, all that was done in regard to the matters that they recite?

A. Well, they recite everything that officially came before the board of equalization. There was a great many things in an informal way we didn't take any notice of.

Q. Well, so far as the Cream of Wheat Company is concerned they recite everything that the board did?

A. Yes, as far as I know. I didn't go into any detail or length of it.

Q. It was merely a matter of taking up the protest and turning it down—it didn't take more than a minute to do it?

A. Oh, it was discussed quite thoroughly. I think, as a matter of fact, it was turned over to the committee at that time. I know it was discussed by the council very generally, who was sitting as a board of equalization, no question about that, because it was a big deal; they figured it a big deal and an important deal.

Q. You were present all the time of the meeting?

A. Except when I would be called to the telephone two or three minutes at a time once in a while right in the next room.

Q. Did they make any computations?

A. The board of equalization?

Q. Yes?

A. Well, the committees put a great deal of work on things that come up before the board of equalization that don't get to me.

Q. So far as you know did they make any computations?

A. No, I don't know as they did any more than what the records so show.

106 Q. They found the assessment on the books of \$50,000.00 a total of \$350,000.00 or whatever it is?

A. Yes.

Q. And found the protest there and they voted to confirm the assessment?

A. To confirm and approve it.

Q. They overruled the protest?

A. Yes, confirmed the assessment as returned by the assessor.

Q. And so far as you recollect there was no computation or discussion of computation?

A. Oh, yes.

Q. So far as you recollect?

A. The board of equalization discussed this matter, no question about that.

Q. I am not asking for your guess, I am asking you what you recollect. Do you recollect?

A. Yes, I will swear they discussed this matter.

Q. Discussed it yes, but did they make any computation so far as you can recollect?

A. Well, the action they took is stated in my record book here.

Q. And other than the record book you can't say you remember any particular computation?

A. No, I wouldn't want to swear to any definite.

Q. Was any member of the state tax commission there present at that meeting?

A. Yes, I think there was a member of the state tax commission there one day near the opening or two or three days afterwards. They were in the city, I think they were, that day—I wouldn't swear to that either; my recollection is that probably there was—I know it was one year, I know it was 1915 one appeared before the board. I don't know for sure whether it was this year or not. It seems to me they were around there; it seems to me it was in 1914.

107 Q. I deem that you don't recollect then just what the tax commission man did?

A. No, he was with the assessor quite a bit. I know one year he appeared before the council and I think informally discussed matters of assessment with them.

Q. I am talking about this 1914?

A. No, I wouldn't swear he was there this year, 1914.

Mr. Brown: I think that is all.

By Mr. Carson:

Q. You spoke of administering an oath to Mr. Londergan orally?

A. Yes.

Q. And you referred to it as that oath, the form of which was in the back of the book—which particular form of oath did you refer to as having been orally administered to him?

A. This is what I supposed I was certifying to, I don't know—I presume that is what a man would certify to if he was certifying to an oath. (Witness indicates plaintiff's exhibit 5, indicates the form of oath at the top of the page.)

Q. You can't swear positively now that that is the form of oath that you administered to him?

A. If that oath was in any of these books or one of these books I administered that oath to him; I will swear to that.

Q. But you have no independent recollection that that particular oath was the one that you administered to him, that form?

A. Why, I read this oath to him and I asked him, when I went after the books they were all spread on the table one beside the other,

but whether it was out of this particular book or not of course I can't say.

Q. Can you pick out the form of oath now in any one of these books that you actually administered to that man at that time?

A. No, and I don't think you would expect me to, any particular oath in any particular book, but they were all laid out on the table.

Q. And all you can testify to now is that you administered to Longdergan orally some form of oath that was in the back of some of these particular books, but you can't swear as to which one?

A. I will swear that the oaths are similar in those books. This is a printed form of oath and the oaths are probably all the same certificate to return the assessment.

Q. According to your best recollection the form of oath that you did administer to Longdergan orally in this form, is plaintiff's exhibit 5, the form of oath appearing there?

A. Well, I can't swear that I administered in this particular book, that I read that oath to him out of this particular book; it might have been book 4, it might have been book 3, I would swear that I administered this oath to him, to the assessor.

Mr. Carson: That is all.

Redirect examination.

By Mr. Burtness:

Q. But in reading the oath you don't remember whether you read it out of this book that is marked 4 or whether you read it out of book marked number 5?

A. No, and I so testify.

Q. But you do have an independent recollection that the oath that you administered was the assessor's return oath upon the assessor's returning the assessment that he had made to the city board of equalization, don't you, Mr. Alexander?

A. Yes.

Q. You testified on cross examination that the city council, 108½ as sitting as a board of equalization, did discuss, to some extent at least, the protest entered by the Cream of Wheat Company, through its attorneys, against the assessments as returned by the city assessor in the year 1914. I will ask you what in your best recollection as to the length of time consumed by the council, sitting as a board of equalization that year in discussing the matter?

A. Well, I don't think there was any day, except possibly the organization day and the last day when we were approving the schedules, but what some form of discussion took place regarding this assessment. It was the big thing before the board of equalization at that time, and we had intimations on different days of some action being taken on this matter in different ways, and I remember that mostly every day they were in session this matter came up and was discussed in some manner or form by the committees, and I heard it around——

Q. If I understand you correctly you say it was one of the rather large items before the city board of equalization at that time?

A. Yes it was.

Q. That attracted considerable attention and was discussed considerably almost every day while the board sat as a board of equalization?

A. Yes, it was the big item of assessment before the board coming the way it did.

Q. You stated on cross examination that when you had some talk with Mr. Toner, one of the attorneys for the defendant company, yesterday, you referred to certain certificates. I will ask you whether the certificates referred to were the certificates such as plaintiff's exhibit 6 and plaintiff's exhibit 4?

A. Yes, these are the certificates that I was referring to. We were talking about the form of these certificates and I said that I didn't remember whether the assessor was present when I signed these certificates or not. I thought this took place in the county auditor's office we were talking about.

Q. Yes, the signing of these certificates took place on June 27, 1914, or thereabouts, at any rate on a different time from the execution of the assessor's return oath found in the back of these assessment books?

A. Oh, yes, that was when the books were turned over to the county auditor.

Mr. Burtress: That is all.

Recross-examination.

By Mr. Brown:

Q. The discussion as you remember it that was before the board at different times on this tax was not a discussion of the amount of it or the way of arriving at the amount so much as it was a discussion there as to whether you could or could not make the assessment?

A. The discussion was that they assessed \$50,000.00 a year for five, six or seven years or something like that; that was the way it was discussed, \$50,000.00 a year. There was some discussion of course whether it was right or wrong of course. They discussed all phases of it.

Q. Right or wrong under the law, that was the discussion, that was the discussion?

A. Probably might be.

Q. They were advised, were they not, either some or all the members, that the tax commission were doubtful of the power of the city or the county or the state to assess such a tax?

A. They were advised the tax commission were of the opinion that that was a lawful tax.

Q. Well, that question of legality was discussed?

110 A. Well, in a form, yes, the tax commission, they figured the tax commission were of the opinion that that legal authority—that this tax was all right. There was nothing came before the

board that I remember of from the tax commission directly, but only he had dealing with the assessor. I don't know what he did with the assessor.

Mr. Brown: That is all.

Redirect examination.

By Mr. Burtness:

Q. Was there any discussion by the board of equalization, among the members of the board, with reference to the amount, that is, as to whether it was high or low or about right, that is, involving that feature of whether it was too high or too low?

A. Why they thought the assessment was all right or they would have equalized it, changed it.

Mr. Toner: Move to strike out the answer as calling for, or as being the conclusion of the witness.

Q. That is by that do I understand you that they did discuss the amount of it as well as the probable legality of it?

A. Oh, yes, sure they discussed the amounts, that is the main thing they were discussing.

Q. The amount was the main thing that they were discussing?

A. Yes.

Q. And after this discussion they took the action as shown by your records?

A. Yes.

Mr. Burtness: That is all.

Recross-examination.

By Mr. Brown:

Q. Was there any presentation made by the assessor or anybody, to support the claim that it was proper or not?

111 A. Oh, I think the assessor——

Q. You are guessing, I want to know about what you recollect?

A. I know the assessor was talking to the board of equalization, yes, about this matter.

Q. You don't recall any computation or basis of his purported conclusion, do you, or any reasons that he gave why this amount was or was not the right amount?

A. No, I wouldn't swear.

Q. And you don't recall that he gave any reason?

A. Oh, yes, I recall that he furnished reasons to the board members, but what those reasons were—I was probably busy with some work there.

Mr. Brown: That is all.

Mr. Burtness: That is all.

Mr. Burtress: May we have the stipulation that all exhibits may be returned to the proper offices where the exhibits have been read into the record, and that in other cases that the stenographer may make copies of such exhibits and such copies may be substituted for the original exhibits.

Mr. Brown: Yes.

M. J. LONDERGAN, being duly sworn, testified as follows:

Direct examination.

By Mr. Burtress:

Q. What is your name?

A. M. J. Londergan.

Q. And where do you reside?

A. Grand Forks.

Q. And how long have you resided in the City of Grand Forks?

A. Nearly thirty-six years.

Q. During the year 1914 did you hold or occupy any official position in the City of Grand Forks, Grand Forks county, North Dakota?

A. I did.

Q. What was it?

A. City assessor.

Q. How long were you city assessor of Grand Forks city?

A. Two years.

Q. And which years?

A. 1914 and 1915.

Q. You were then assessor, were you, Mr. Londergan, when these assessment books and rolls which are on the outside marked "1914 assessment Book, Personal, 4 and 5" were made up?

A. Yes.

Q. And were they made up by you or under your direct supervision?

A. Yes.

Q. You I take it then were also the assessor who made the assessment shown on plaintiff's exhibit- 2 and 3 against the Cream of Wheat company, that is, exhibit- 2 and 3?

A. Yes I was.

Q. Prior to making this assessment, Mr. Londergan, did you make any efforts or attempts to get statements from the Cream of Wheat company as provided for in section 2110, Compiled Laws, 1913, and so, what did you do?

A. Well, now in regard to this section I am not positive whether that was the section that was referred to but I applied to the company, to both the president and secretary, for statements under a certain section of the statute, I couldn't tell which, I couldn't recall the number.

Q. You don't recall the number of the law that you were working under?

A. No.

Q. But if I understand you correctly, you did apply to the secre-

tary and president for statements asking for the information which is referred to in this section, as, for instance, information as to the name, location of the company, the amount of its capital stock, the value of such stock, or the actual value of the shares of the stock, the total indebtedness, the value of all real property and the value of all personal property; that is, the question is did you ask the defendant company to furnish you a statement containing such information about it?

A. I asked the company for a statement, a property statement and furnished them blanks which was submitted by the tax commission for that purpose specially printed to cover such cases. Now I can say as to the contents of that printed statement, whether it corresponds with that law or not, but the section under which it was adopted was printed on the statement.

Q. And you say you took the matter up with the president and secretary, and in what manner, by letter or personally, or what do you mean, Mr. Londergan?

A. Why, letters, correspondence, and verbally with the president.

Q. And when you say the president who do you mean?

A. Mr. S. S. Titus of Grand Forks.

Q. He was at that time living in Grand Forks, was he?

A. Yes.

Q. And you said you took the matter up by letter, about what did you do that?

A. Why, during the months of either April or May, 1914. Now the dates of those letters I couldn't exactly tell.

Q. And to whom did you write the letters?

A. To S. S. Titus, president of the Cream of Wheat Company and E. Mapes, secretary of the same company.

Mr. Brown: We admit that in 1914 the city assessor requested the company to make a return of items under section 2110, Compiled Laws, 1913, and furnished blanks containing those items and asked for the return of the items as specified in 2110, and the company refrained from making any such return for reasons which they believed sufficient. It seems to me since I have made the admission, I refer of course to 1914. The request was made as for the year 1914. I don't admit there was any request made for the years 1908 to 1913 inclusive.

Q. Mr. Londergan, in asking for the information as you have testified from the officers of the Cream of Wheat Company, did you ask for the specific information for each of the years 1908 to 1914, did you simply ask for the information as of the time that you made these requests?

A. I didn't specify any year for the statement made, merely in doing the letter at the time it was written.

Q. Did you notify them of the assessment that you made after completion thereof by you?

A. Yes.

Mr. Burtness: You may cross examine.

Cross-examination.

By Mr. Brown:

Q. Mr. Londergan, the action that you took in this matter in finally making the assessment, you took under the direction of the state tax commission?

A. Why, I asked their advice.

Q. Yes, you asked their advice, but what you finally assessed in the matter of assessment you finally made under their advice and direction?

A. Yes.

Q. You didn't get any returns from the Cream of Wheat Company?

A. No, sir.

Q. And before the end of the month of May, not having a return from them, you put down \$50,000.00 as the total assessment under this particular intangible statute, whatever you call it?

A. Yes.

115 Q. Put down \$50,000.00 under item 2110, Compiled Laws, 1913—You assessed them \$50,000.00?

A. Yes.

Q. And you put that down under the item "stocks and bonds"?

A. Yes.

Q. Item 21—

A. As shown by the books.

Q. And you put that down under authority of this statute that said that the assessment under that statute should be put down as stocks and bonds?

A. Under the authority of the section furnished by the tax commission covering the case.

Q. There is no dispute about it, Mr. Londergan; we are all talking about 2110?

A. Well, it was under that section.

Mr. Brown: It was section 1503 under the code of 1905 and under the statutes of 1913 it was section 2110, the same thing.

Mr. Burtness: It is so conceded.

Q. When you put that down under the item "stocks and bonds" you didn't have in mind assessing the Cream of Wheat Company for stocks and bonds as such, you simply put that \$50,000.00 in that item to cover the assessment under this statute in question?

A. Yes.

Q. When you came to determine whether you would put it down \$50,000.00 or \$5,000.00 or some other sum, did you make any inquiries as to what was the market value of this stock?

A. Yes.

Q. Did you find that that stock had been listed on the market anywhere?

A. No, sir.

Q. Did you find that there had been any sale of that stock that you knew of?

A. No, sir.

Q. And then you couldn't find that it had any market value, could you?

A. Yes.

116 Q. I am talking about market value?

A. That is what I have reference to.

Q. You found, as far as you could find, that there had been no sale of stock, and you didn't find it listed on the market?

A. What I consider a market value isn't especially on a listed stock, but on a bid and asked offer.

Q. On a bid and asked offer?

A. Yes, on a bid and asked offer.

Q. You mean in a mortgage sale or private sale?

A. No sir, private.

Q. Did you find any bid or asked offer?

A. Well, as to the authority I couldn't quote, but I did get information from what I thought reliable source, of a refused price.

Q. You mean that one stockholder had refused on a bid from somebody else?

A. One stockholder had refused a certain bid price.

Q. You didn't get that information from the stockholder himself nor from the other party?

A. No, sir.

Q. It was secondary or third grade hearsay information?

A. Yes.

Q. Somebody told you that they had heard that a certain bid had been made and certain refusal had been made?

A. Several reputable men in the financial world in the city here that were very reliable.

Q. Gave you their opinion; they didn't claim to hold any stock?

A. No.

Q. But claimed to give you an opinion based on such information as they might have had or what somebody might have told them as to what their opinion was as to the value?

A. They gave a statement that a certain man offered and refused for a certain amount of that stock.

117 Q. And none of your informants claimed to have been a party to any such transaction?

A. No, sir, didn't claim to be.

Q. And on the basis of that information you put down \$50,000.00?

A. Not that alone.

Q. What further was the basis of your putting down \$50,000.00?

A. General information from different sources.

Q. What was the nature of it?

A. As to the returns from revenues of the stock.

Q. That was hearsay information too?

A. Certainly.

Q. Just heard it around?

- A. Yes.
- Q. Kind of a rumor?
- A. No rumor, simply talk.
- Q. Talk that Cream of Wheat stockholders were making money?
- A. Couldn't get a word from the stockholders.
- Q. No, rumor or information that the stockholders were making money?
- A. Talk or rumors whatever it was, it was information submitted by parties; wherever they got it I don't know.
- Q. But none of the information came direct from the stockholders?
- A. No, sir, not that I know of.
- Q. Or anybody that pretended to know?
- A. Well, those parties did claim to know.
- Q. Well, was there any other kind of information upon which you based your \$50,000.00?
- A. No, sir.
- Q. Did you have any information in regard to the capital stock—the amount of capital stock authorized, or the number of shares into which the capital stock was divided?
- A. Not officially, but I did have conversation with a prominent stockholder that did give me those facts.
- Q. The amount that was authorized?
- A. Yes.
- 118 Q. And the amount of capital stocks that had been issued?
- A. Yes.
- Q. And the amount per share?
- A. Well, that is beyond my recollection, but I think that was in the statement, the par value of the stock was all.
- Q. The par value of the stock?
- A. Yes and the amount of shares.
- Q. And the number of shares outstanding?
- A. Yes.
- Q. Did you have any information in regard to the total amount of indebtedness of the company?
- A. No, sir.
- Q. Did you have any information as to the value of the real property of the company?
- A. No, sir.
- Q. Did you have any information at all as to the value of the personal property?
- A. No, sir.
- Q. Did you make any computation based upon the use in any way of some value, of assuming some value for the tangible real estate of the company?
- A. No, sir.
- Q. Or did you make any computation or attempt any computation which assumed in anywise any value for the personal tangible property?
- A. No, sir.

Q. Or which assumed in any way any amount for indebtedness?

A. No, sir.

Q. Or which assumed any particular amount for either the market or actual value of the stock outstanding?

A. I didn't get that last.

Q. Or any computation which assumed in any way any particular value for the total amount, for the market value or the actual value of the total stock outstanding?

A. No computation made, simply arrived at the amount from the general information.

Q. Which you have described?

A. Which I considered was very, very low.

119 Q. That is the way you got at this \$50,000.00 that you finally put down in the book—didn't result from any computation under this statute at all?

A. No, sir.

Q. You didn't attempt any computation under this statute?

A. No, sir.

Q. You didn't take into consideration whether the value of the stock that you heard of was represented by real estate in the city of Grand Forks or otherwise?

A. The value of the stock as I figured or concluded from the information, was derived from the returns of the earnings of the stock.

Q. Well, when you put down this \$50,000.00 you didn't take into consideration at all as to whether or not, and if so how much real estate the company owned on which they paid taxes?

A. No, sir.

Q. And you didn't take into consideration at all or to any extent whether or not they had any, and if so how much tangible personal property upon which they paid taxes?

A. No, sir.

Q. Nor any consideration, as you said, of any indebtedness?

A. No, sir.

Q. Nor as to whether at any time they were paying taxes on monies and credits?

A. In this state?

Q. Anywhere?

A. No, sir.

Q. You made no computation of that sort?

A. No, sir.

Q. So far as you know did the tax commission or anybody in connection with this matter make any such computation—so far as you know?

A. So far as I know I don't know.

Q. So far as you know they did not?

A. I have no knowledge of it, no.

119½ Q. Yes, that is what I mean. You didn't make any computation then according to the terms of the statute, section 2110, or as it is admitted the old statute was section 1503 of the

statutes of 1905—you didn't make any computation using the items set down in that statute?

A. No, sir, I had no information on those points.

Q. And you didn't make any statement out under those statutes?

A. No, sir.

Q. And your return was not made according to the provisions of those statutes, but it was just simply a lump sum arrived at by you without computation?

A. Yes.

Q. Did you attempt to find out whether the Cream of Wheat Company had any real estate or any property of any kind in this state?

Mr. Burtness: Objected to as incompetent, irrelevant and immaterial—withdraw the objection.

A. Why, I had no means of finding out the ownership of real estate outside of the city only from the advice of the company.

Q. Well, you did know then within the city?

A. Yes.

Q. Well, now from your knowledge as city assessor, did the company have any real estate in this city?

A. Not in their name.

Q. Did they have any personal property so far as you know?

A. Not to my knowledge outside of the amount that was assessed against them in this item.

Q. Well, that wasn't tangible property. Your assessment that you made didn't attempt to cover or be charged on any tangible property?

A. No, sir.

Q. It was the intangible property that is spoken of in section 2110?

A. Yes.

120 Q. So when you made this \$50,000.00 assessment for the year 1914, you made at the same time, under the direction of the state tax commission, an assessment for those previous years of the same amount?

A. Yes.

Q. 1908 to 1913 inclusive?

A. Yes.

Q. And you put on the books as they have appeared here in evidence?

A. Yes.

Q. The assessment was made out by you at the requirement of the state tax commission?

A. I inserted the assessment myself. I asked the state tax commission for advice and instructions and was advised to make the assessment as made.

Q. When you finally got around to put on this \$50,000.00 assessment in the manner that you have stated, you put on that \$50,000—you took that action under the orders or requirement of the state tax commission?

A. Yes.

Mr. Burtness: I object on the ground that it is not an intelligible question because it isn't plain whether the question relates to the assessment itself, the act of assessment being made under the requirement of the commission or whether it refers to the amount \$50,000.00 being dictated to this witness by the state tax commission or that such amount was entered under the requirement of the tax commission. I think there are two circumstances, one is the act of the assessment, whether that was under the requirement of the commission and the other is the amount of the assessment.

A. The act, it was done under——

Q. Wait a minute, there is no question before you. You have answered the question?

121 A. I can change my answer if I want to. The amount arrived at was done at my own initiative and the tax commission had no word or action in the matter at all in arriving at the amount.

Q. But the fact that you did make an assessment was required by the tax commission?

A. I was required by law to assess all the property. I asked the tax commission for advice and instructions as to whether or not this was a North Dakota corporation. After that fact was settled by the tax commission I went on my own hook and assessed them.

Q. You didn't initiate the idea of assessing for back taxes?

A. No, sir.

Q. That came from the tax commission?

A. Yes.

Q. And you made your assessment for back taxes under the requirement of the tax commission?

A. Yes.

Q. And you followed their instructions and directions?

A. Yes.

Q. And you so reported to the Cream of Wheat Company, did you not?

A. Yes.

By Mr. Carson:

Q. Mr. Londergan, calling your attention to plaintiff's exhibit which is page 18 of the auditor's escaped book or book of escaped property, and calling your attention particularly to the six long slips which are pinned onto this plaintiff's exhibit 1 on page 18 of that book, I will ask you to examine the writing on each of those slips if you will and say whether or not it is your writing?

A. It is mine.

Q. And at what time did you make out those slips?

A. May 29th, 1914.

Q. Each of those slips attached to that plaintiff's exhibit 122 were made out on May 29th, 1914?

A. Yes.

Q. Just tell us what you did after making out those slips, please.

A. Those slips were made out and entered in the back of book

Personal Property Assessment, 1914 Personal Property Assessment, and the detached coupons was probably mailed to the president of the company, or in the letter notifying him of the action.

Q. Then after you had made out those slips and then had made his entry in the personal property tax book number 4, what did you do with that personal property tax book number 4 and those slips?

A. Why, they were submitted to the city auditor to be held open for inspection for a number of days until the city board of equalization would meet.

Q. And do you know of your own knowledge where those slips went to from the city auditor's office?

A. Why, from the city Auditor's office I presume they—no, I don't know about that either. I think they were filed with the county auditor. All those field notes are taken over to the county auditor's office.

Q. Along with the personal property tax book number 4, which is really your assessment book?

A. No, sir, the personal property books go to the city auditor and they are held for a number of days till the city board of equalization meets and equalizes, then in time the books are taken by the city auditor to the county auditor and those field slips remain in the city assessor's office until such time as he takes them over before the county board meets.

Q. I will ask you to state, Mr. Londergan, while you were assessor, whether it was your practice to take an oral oath—whether you ever did take an oral oath on these assessment rolls or whether it was your custom to sign the oath?

A. Well, this oral oath, my recollection, was taken in 1914 and 1915, reading the printed blank in the books by the city auditor.

Q. Is it a fact that it was your practice while city assessor not to take an oral oath but merely to sign the oath, and wasn't that your uniform practice while you were city assessor, to appear before the city auditor to sign the oath, then he would sign as an officer?

A. I was only in the office two years and it was only done twice.

Q. Didn't you state to Mr. Toner and myself yesterday afternoon, that while you were city assessor that it was your uniform practice to sign these oaths before the city auditor?

A. Yes.

Q. And not to take an oral oath but merely sign before him?

A. An oral oath, I didn't take any oral oath. The oath was read to me from the book at the beginning of the signing up of the five books and I subscribed to all of them as I thought.

Q. And the oath that you took was the one that you signed, is that it?

A. That is what I thought I did.

Mr. Carson: That is all.

Redirect examination.

By Mr. Burtress:

Q. Mr. Brown asked you a number of questions, Mr. Londergan as to whether or not you made computations as prescribed by section 2110, compiled laws, 1913, relating to the value of personal property, real property, debts of the defendant company, etc. and you answered that you did not. I will ask you why you didn't make such computations?

Mr. Carson: Object to that as immaterial.

124 A. Why, there was no computations made, that is, from absolute figures—additions and subtractions—were made at all.

Q. Why not?

Mr. Carson: Objected to as immaterial.

A. Had no such information.

Q. Were you unable to get such information from the defendant company, or its officers?

A. I couldn't even get a reply on anything; refused to give any information.

Q. Did they fail to answer your letters even?

A. Never answered a line.

Q. Could you get such information from the president of the company, Mr. Titus, who was a resident of Grand Forks at that time when you asked him for it?

A. I endeavored to. I asked Mr. Titus and he referred everything to the secretary in Minneapolis, claiming that he mailed his statements that I mailed to him to the secretary.

Q. And do I understand you correctly then that Mr. Titus failed to give you any of this information that you asked him for?

A. Yes, sir.

Q. And you have told us about the inquiries that you made with reference to the revenue that was produced by the state, etc. Do you personally know stockholders, people whom you understood to be stockholders of the company?

A. Yes.

Q. Had you any visible evidence, Mr. Londergan, of such stockholders acquiring wealth by reason of the fact that they were stockholders of the Cream of Wheat Company?

Mr. Carson: Objected to as immaterial, and as calling for the conclusion of the witness.

A. You asked me if I had visible knowledge.

125 Q. (The question is read to the witness.)

A. I couldn't ascertain that.

Q. I will ask you whether or not it is a matter of general information and knowledge in the City of Grand Forks, Mr. Londergan,

that the stock in the Cream of Wheat Company pays enormous dividends?

Mr. Carson: Objected to as incompetent, irrelevant and immaterial, no foundation laid.

A. That was the general knowledge around the city, everybody pretended to know anything about it.

Q. And if I understood your cross examination correctly it was you yourself who determined the amount of the assessment to be made, both for the years 1914 and for the years 1908 to 1913 inclusive?

A. Yes.

Q. And was the amount that you put down—the amount that you put down for each of those years your best judgment upon the information that you were able to get?

A. Yes, sir.

Q. And for the years 1908 to 1913, if I understood you correctly on cross examination, you stated that you made the assessment under the requirement of the state tax commission but that the amount of the assessment was the one that you passed upon in your own judgment?

A. That is right.

Mr. Burtness: I presume it is conceded that no assessment of any kind was made against the Cream of Wheat Company for the years 1908 to 1913 except the one involved in this litigation in Grand Forks.

Mr. Brown: In the State of North Dakota.

126 By Mr. Carson:

Q. Before you finally determined on this \$50,000.00 figure which you attempted to make this assessment, didn't you take that matter up with the tax commission as to the amount of that figure?

A. As to that amount?

Q. Yes?

A. No, sir, I don't think so, I am not advised yet as to my action.

Q. You didn't check up with them beforehand though as to whether that \$50,000.00 figure was all right?

A. No, sir.

Mr. Carson: That is all.

Mr. Burtness: That is all.

Mr. Burtness: At this time the plaintiff asks the defendant to produce all inventories made by the defendant company beginning with January 1st, 1908 to date, showing the amount, value and location of tangible property, including bills receivable owned by such company during said period, as well as any other records giving or throwing light upon such information in accordance with the notice to produce served upon defendant's attorneys on February 16, 1917.

Mr. Brown: We have no such inventory.

Mr. Burtness: What about the records?

Mr. Brown: We have no bills receivable, that is, I mean we brought none, we have none here as a matter of fact. And we certain—you say any other records. Of course, that is kind of a vague term. We have probably not what you mean by that item—records is pretty broad terms.

Mr. Burtness: The county of Grand Forks has not kept the books for the Cream of Wheat Company of course, but our demand
127 was made broad purposely.

Mr. Brown: You say any records giving or throwing light upon such information. We have brought certain things here but come under other parts of the notice to produce.

Mr. Burtness: Do I understand the defendant that they refuse to furnish records or other evidence showing the value and location of its tangible property from January 1st, 1908 to date?

Mr. Brown: Why, as far as inventory is concerned, we brought no inventories; I don't understand they are inventories. We have brought certain tax receipts and records which show the assessments upon other property.

Mr. Burtness: That wasn't my question. In view of the fact that the defendant apparently refuses the request, the defendant having had time to produce such books, the plaintiff now demands that the defendant produce the books and records of the defendant company showing the amount of dividends that have been declared on the capital stock thereof since January 1st, 1908, all in accordance with the notice to produce which was served upon defendant February 16, 1917.

Mr. Brown: We haven't brought them, and we have made no attempt to get them.

Mr. Burtness: At this time the plaintiff asks leave to file an amended complaint herein, the only part of the amendment being paragraph three in the complaint, and hand a copy to counsel for the defendant and proposed amendment to the court.

I might say that I believe the entire complaint is now written in the form proposed, but I haven't it here. I can send over to the office and get it.

128 Mr. Carson: The defendant objects to the proposed amendment of the complaint on the ground of surprise; that the case has been, as shown by the files, at issue for many months; and also on the ground that the records show that the city tax commission, acting through the city assessor, attempted to back tax this company for the years 1908 to 1913 inclusive; the records further show that this attempted assessment thus made by the tax commission, acting through the city assessor, for the years 1908 to 1913 inclusive, was presented by the city assessor of Grand Forks to the city board of equalization of Grand Forks; that it was attempted to be equalized; that it appeared on the assessment roll of the city assessor thus equalized and filed by the city auditor with the county auditor and that this attempted assessment by the city assessor shows on its face that it was made before the attempted action by the county auditor and under the law plaintiffs would not be permitted to claim two theories at one time. They are required to stand on the real facts,

that is, that there was an assessment—attempted assessment made by the tax commission, acting through the city assessor.

Mr. Brown: State to the court how they change the theory between the original and the amendment.

Mr. Carson: The proposed amendment makes this change. The original complaint alleged that for the back years it was made by the county auditor acting under the supervision of the tax commission. In our answer we deny that and allege that the attempted assessment for the back years, 1908 to 1913, was made by the tax commission of North Dakota acting through the city assessor of Grand Forks, and the facts show that the attempted assessment for the back years was so made. How, under the law—

The Court: Do they allege, do they allege that now?

Mr. Carson: Now they attempt to proceed both ways, claiming that the assessment was made by the city assessor through the requirement of the tax commission and that the assessment was made by the county auditor as to those same years and that they were presented to the county board and equalized.

The Court: You have got all the records here showing just what the facts are in the case and everything has gone in. I don't see how it can be prejudicial to you at all. I will allow the amendment.

Mr. Carson: Exception.

Br. Burtness: Plaintiff rests.

Mr. Carson: At this time the defendant moves to dismiss on the ground and for the reasons, in the first place the record now shows that as to the back assessments — was not made by any officer authorized by law to back assess the company, for the reasons that there is no statute or any other provision of law which gives the *the* city assessor of Grand Forks authority to make a back assessment. The only thing he can do is to assess for the current year. So much for the attempted assessment for the back years by the city assessor.

The attempted assessment by the county auditor was absolutely without any authority under the statutes of North Dakota, for the reason that if the auditor has any power at all to back assess it is confined to tangible property. Furthermore, under section 2217, under which I understand the auditor attempted to proceed, the only conditions under which the auditor can make back assessments, even as to tangible property, are where the property has been omitted or the assessment of which has been set aside, and on the record as it now stands this property had not been omitted, but it is an attempted assessment made by the city assessor and shows before the attempted assessment by the auditor that it stood on the records and the validity — not been determined or set aside by any court and neither of the two conditions existed on which the auditor could make the assessment.

On the further ground, as to each and all of the assessments the evidence shows that they were direct assessments by the tax commission and as such contrary to the constitution of North Dakota, particularly the provision requiring property to be assessed by the local assessors.

On the further ground that the steps required by the laws of North Dakota were not taken and that there was no legal tax.

On the further ground that the company is not a subject of taxation and the record shows that fact, has no tangible or personal property or any real estate in North Dakota.

On the further ground that the record as it stands shows that the assessment roll on which the attempted assessments appear, has never been verified.

And the further point that inasmuch as there is no showing that this company has any real estate or tangible personal property in this state, to attempt to assess it on any claimed intangible value of its stock would be unconstitutional, because the tax provided for by section 2110 is a property tax and not a franchise tax, and inasmuch as it is a property tax and inasmuch as the company has no property

within the State of North Dakota and did not have at the
131 time of the attempted assessment during any of the years for which assessment is attempted, any attempted assessment against this company, either for current years or for any back years, would take the property of this company without due process of law under the provisions of both the federal and state constitutions.

And also on the further ground that even if the attempted—the officers attempted to make these attempted assessments had any authority to assess, the record now shows that they did not take the statutory requirements and conditions precedent to a valid assessment—the record fails to show compliance with the statutes of North Dakota concerning the assessment.

The Court: The motion of course will be overruled for the time being.

Exhibit A is marked for identification.

Mr. Carson: Defendant offers in evidence defendant's exhibit A and ask leave to substitute a copy in place of the original, the copy being marked exhibit A, and this defendant's exhibit A being a certificate by the secretary of the State of Minnesota that the company has been admitted to do business in Minnesota as a foreign corporation.

Mr. Burtness: There is no objection because the exhibit is a copy, but the offer is objected to on the ground that it is irrelevant and immaterial, throwing no light on the issues in this case.

Mr. Carson: You don't make any objection to the competency or sufficiency of the proof to show that we are licensed to do business in Minnesota?

132 Mr. Burtness: No, your proof stands there. We don't care whether you are or not, that is the point.

ROME G. BROWN, being first duly sworn, testified as follows:

Direct examination.

By Mr. Carson:

Q. Your name is Rome G. Brown?

A. Yes.

Q. And you reside in Minneapolis, Minnesota?

A. I do.

Q. What is your business, Mr. Brown?

A. Attorney at Law.

Q. What firm?

A. Brown & Guesmer.

Q. You are the senior member of that firm?

A. Yes, have been for the last ten years or more.

Q. And state whether or not you have ever acted as attorney for the Cream of Wheat Company?

A. I have been general counsel in charge of all their legal matters and general office, not legal matters, certain business matters, for the past twenty years.

Q. State whether or not that includes merely matters of litigation or other matters?

A. There are certain phases of their business that are, both from the business viewpoint and legal viewpoint, are in whole and in part, some of them almost entirely, conducted through my office.

Q. And you may state, if you will, what the particular phases of their business are that are in your particular charge as attorney for the company?

A. The acquisition of property, the property which they own and have at different times. The returns, particularly with regard and particularly the location of their property, the returns that are necessary to be made under the different jurisdictions wherein they have property for the purposes of taxation and other purposes. As I say, the payment of taxes and the amounts assessed and the amount
133 of taxes paid on the various classes of property owned at various times and in various localities by the Cream of Wheat Company, their different agencies, and the general method of their doing business.

Q. Are there any other phases of their business that are in your particular charge as counsel for the company besides the matter of taxation?

A. Those are the particular principal ones.

Q. And how long have you had that particular matter of taxation in charge as attorney for the company?

A. Oh, twenty years I should say.

Q. Continuously during that period?

A. Yes. Well, there are other phases for classification in different states, the effect and the nature of their ownership or control over property that has at any time a physical status or situs in different jurisdictions, and the requirements as to taxation returns and conforming to the laws of the state, and also the method of their contracts and the method of their sales—as to the place where the con-

tracts are made and the method; and in connection with that, although that hasn't been in my charge, that is, I mean it isn't exclusively in my charge, I have full knowledge of their method of doing business, and nature of their business.

Q. And you have had occasion frequently during this entire twenty years' period to advise them from time to time as to the methods of doing business?

A. Not only the legal phases but the business phases as well, other business.

Q. I was just going to ask you. Describe the business that they are engaged in if you will?

A. Their business is the manufacture of a certain cereal product which is denominated Cream of Wheat, and the manufacture
134 consists of buying a selected quality of middlings from various mills, and confining their selection as to quality and size, etc. they take this particular quality of middlings and after a certain cleaning process which they subject it to in their factory, including cleaning process by wind and by heat, they pack it in packages and sell it, and all their operations, that is, I mean their manufacturing operations and selling operations, are conducted from their factory in Minneapolis, and that has been the case now for over twenty years.

Q. And you may state whether they have ever had any other business than the manufacture of this cereal product?

A. None at all.

Q. That has been their sole business for how long?

A. That has been their sole business for years—they organized somewhere in 1897 I think.

Q. And particularly during the years, calendar years of 1908 to 1914 inclusive, I will ask you to state, if you know, at what place the defendant company had factories?

A. Their only factory and their only place of business, distinguishing place of business from the technical, theoretical principal office—their principal office, being a North Dakota corporation the principal office, that is, their corporate—that is, where their stockholders' meetings are held, has been in the City of Grand Forks, and yet maintain that office. They have, however, even in connection with that office, they have no property whatever; they have no property whatever of any kind in the State of North Dakota, no tangible
135 property. Of course, we claim in this case no intangible prop-

erty. Of course that is a question. They have no tangible property situate in North Dakota, nor have they had during the years 1908 down to this date. They have, beside this factory in Minneapolis, they have since I think 1914, I think that was established in 1915, they have since 1914 they have established a factory in Winnipeg for their exclusive Canadian trade, but outside of that factory in Winnipeg there is not anywhere any factory or place of business, except so far as their corporate office is concerned, which is a theoretical thing, because they don't even own an inkstand, they simply have their corporate office in a place that is given them at Grand Forks, the office of the First National Bank at Grand Forks.

Q. State whether or not they have any personal property of any kind in connection with that corporate office in the First National Bank building in Grand Forks?

A. As I say they have none whatever, not even an inkstand, and didn't have during any of the years 1908 to 1914 inclusive. Their property in Minneapolis, what their property does consist of—

Q. I was going to ask you whether or not they have any personal property in connection with the factory in Minneapolis?

A. Oh, yes.

Q. You may state what that personal property was during the years 1908 to 1914 inclusive?

A. That property in Minneapolis consists of their—of a leasehold, I think it is for a hundred years, on a certain tract of land.

Mr. Burtress: Objected to on the ground that there is no foundation laid.

A. I know that, I made the lease and I have conducted all transactions.

136 Q. Mr. Brown, you say that the company has a factory at Minneapolis?

A. They have real estate in Minneapolis, that real estate consists of a leasehold of a considerable tract of land on Fifth street, I think it is a hundred year lease, and of the building which they themselves have placed upon it and which building they own themselves. They have of course the fixtures and furniture in that building, and the machinery. And then outside of that their property consists of their stock, either all the material that they happen to have on hand or manufactured material. That manufactured material was—is and was during these years in question situated legally either in Minneapolis or in store houses in various states ready for delivery from those store houses to the customers in that proximity. On West from Minneapolis all sales in their business are made in Minneapolis.

Q. You mentioned that they had property in storage at different places besides Minneapolis. State whether or not they had any property in storage in North Dakota?

A. None whatever in any of these years. They haven't had in North Dakota. They have done no business here in any sense of the word any more than to ship a consignment of goods from Minneapolis to some purchaser in North Dakota somewhere. They have had no storage house with goods in it, and they have had no bank account at any time in North Dakota.

Q. Where are the general executive offices of the company located, state if you know?

A. The business executive offices of the company are located in Minneapolis.

Q. And how long have they been located there?

A. During all this time, twenty years, ever since they went there, which was in 1897 I think. They organized in North Da-

137 kota with the intention—

Mr. Burtness: Just a minute. The intention with which they organized in North Dakota is objected to, or any testimony to that effect on the part of this witness is objected to as incompetent, irrelevant and immaterial, throwing no light on the issues in this case.

A. They organized in North Dakota and without transacting any business here as the Cream of Wheat Company or establishing a plant as the Cream of Wheat Company, whatever their intentions were, they moved in 1897 their entire business and property to Minnesota and qualified there and have since been qualified as shown by the records in evidence, to conduct their business in Minnesota, and as the record shows using all their capital stock in that business in Minnesota, the full amount,—using all their capital stock. The certificate shows the entire capital stock is \$40,000.00 par value.

Q. I will ask you to state, Mr. Brown, if you know, whether or not the company, either now or during the years 1908 to 1914 inclusive, ever owned any stocks or bonds in other companies?

A. Not a dollar of it, none at all. They hold no stocks or bonds of any kind.

Q. Another point. I understood you to say that neither now or any time during the years 1908 to 1914 inclusive did the company maintain any bank account or have any money in the banks of North Dakota?

A. No, sir.

Mr. Burtness: Are you the treasurer of the company, Mr. Brown?

A. No, sir.

138 Mr. Burtness: Did you handle this bank account?

A. No, sir, not directly.

Mr. Burtness: Move to strike out the answer on the ground that there is no foundation laid.

The witness continues: But my particular business with the company is to keep informed and advised in regard to the properties in the different states, and from my connection, which I say has been partly in the business and partly in the legal end of it, I testify from absolute knowledge on the subject, that there has never been any bank account in North Dakota, at least not since 1900.

Q. State if you know, Mr. Brown, where the general books of account, including customers' books of account, are kept?

A. They are kept in the Minneapolis business office.

Q. And remittances for the products of the company which are sold, where are they received if you know?

A. Received there in Minneapolis.

Mr. Burtness: I would like to ask a question for the purpose of laying foundation for an objection.

By Mr. Burtness:

Q. Mr. Brown, as I understand it you are general counsel for this company?

A. Yes.

Q. Where is your office, Mr. Brown?

A. 1000 Metropolitan Life building, Minneapolis.

Q. How many blocks is that office from the factory and plant and the general business offices of the Cream of Wheat Company?

A. Oh, approximately five blocks.

Q. You are not engaged solely as the attorney for the Cream of Wheat Company, are you, Mr. Brown?

A. No.

Q. You are engaged in general practice and have a very extensive practice?

A. General practice, but with no company in these phases so intimately as with the Cream of Wheat Company.

Q. You are not an officer of the Cream of Wheat Company?

A. I am not an officer, no.

Q. Or a director?

A. No, except—I am not a corporate officer, but I am and have been right straight through the general counsel for the company, which is in one sense of the word an office.

Q. Are you a stockholder of the company?

A. I am not I am sorry to say.

Q. You are not the person in charge of the selling end of the company at all; you have nothing to do with the selling end of the company?

A. Not in its everyday operations.

Q. And have nothing to do with the general business as it is being done, as orders are given for its products and orders filled and the payments therefor made, etc.?

A. Not to participate in those transactions myself from day to day, but as general counsel of the company I have very particular reasons, especially during these years I have kept in close touch with the particular operations and the manner of operations.

Q. That is, you have advised the officers as to how these things should be carried out?

A. No, not so much that, I have done that of course, but not as much that as to keep myself informed as to how they were doing.

Q. And your method to find out would be to ask the officers and they would tell you?

A. In one way partly and in going through the papers which were evidence of the transactions themselves and the manner in which the business in regard to them was done.

Q. You mean checking invoices?

A. Yes.

Q. And claims that these companies have against, for instance, the Colton-Wilder Grocery Company of Grand Forks, if it sends in an order for some cream of wheat—

A. That might be one phase of it.

Q. Do you mean to say, Mr. Brown, that this was your work as general counsel of the company, to check through these bills and invoices as they are made?

A. I don't check them all, but if there is a dispute which involves

a particular invoice, or if it is a dispute that involves the whole manner and system of their doing business, it has become a necessity for me and I have performed my duty by going through and informing myself as to the detail of doing business, how sales are made and where made, and to keep myself informed, particularly during these years, because the business and manner of doing business, particularly in 1907, would be open to attack by the United States government, and I have kept myself informed and very closely in touch, not only with the general manner of business, but ordinary details and transactions made were put on my desk so that the system of business would stand the utmost test when we came to trial and that test came last year.

Q. And I presume your general manner of becoming acquainted, not only with the general manner of doing business but with the details thereof, is from information given you by the officers and men in charge of the different departments of the company?

A. In part only, I have been through the papers and transactions and books just the same as an accountant or expert would go through with them, and I know from the knowledge I have so obtained, and in many ways not mentioned in detail, not only their general way of doing business, but in all the essential details.

Q. And this knowledge you have obtained from books and records that they have had occasion to bring to you for that purpose?

A. Not confined to that at all, sir, I have gone down there and groped for days myself to inform myself and to establish my information upon a basis where I could make no mistake in regard to their system of business.

Mr. Burtress: Any testimony attempted to be offered by this witness as to the manner of doing business of the Cream of Wheat Company in detail with reference to its property in detail or with reference to bank accounts and other matters that have been inquired about, as well as the question last asked by counsel, are objected to as there being no sufficient foundation laid by this witness to furnish it, he having no personal knowledge thereof and such knowledge as he may have must of necessity have been gotten through hearsay.

The Witness: Some of these matters I can say, Mr. Burtress, I can probably state of my own better than the officers of the company—some of them.

Direct examination resumed by Mr. Carson:

Q. Now, Mr. Brown, you stated that one of the particular phases of the Cream of Wheat business which you are in charge of as general counsel of the company, was the matter of taxation?

A. Yes.

Q. State whether or not that included merely taxes in litigation or other tax matters?

A. All tax returns to show what property they had or had not acquired, they had or had not which was upon any previous return, and wherever they made a return, and to see that the assessments when made

made consistently, at least not more burdensome than the cons required, involving investigation of the property that they had including the assessments that were made, not only in Minne but in the different states in the Union where assessments have a made of their stock on hand—the amount of assessment, the unt of tax paid and the direct payment of taxes has, in some inces just—even the checks have been forwarded through my of and the receipts come back there; not in all instances; but the transactions in each year is supervised by myself or in my office er my direction. That includes not only taxation upon real te and on tangible property but all other forms of taxation what-

Q. And did you state for how long a period that matter has been dled in that way?

A. It is at least over ten years, twelve or fifteen years more or less t along, but particularly for the past ten years, twelve years, r since the Sherman Act was passed. When was that passed?

Mr. Brown: Exhibit B as originally marked is withdrawn. Exhibit s now marked is a summary of the amount of the assessments and es paid on real and personal property of the company in Minne- a and other states during the years 1908 down to 1914 inclusive.

And it is stipulated that this summary may be used instead of the original tax receipts as a matter of convenience, subject to such correction as any motion or otherwise should correct.

Mr. Burtness: That is satisfactory, it being understood that the receipts for personal property cover only taxes levied and as- sed upon tangible property—tangible personal property of the defendant corporation in the various jurisdictions shown by the summary.

Mr. Carson: Except in the case of Hennepin county, Minnesota, r the years 1911, 1912, 1913 and 1914 the company has been as- sed and paid taxes on monies and credits as shown in that tab- ulation.

Mr. Burtness: That is shown in the summary. Money is tangible property.

Mr. Brown: Yes, but credits are not. This money and credits m is returned to include all the monies that they have on hand and monies that are due them in any form of credit practically, ac- counts receivable that is assessed and in addition to the tangible per- sonal and tangible real property.

The Witness continues: Now, referring to exhibit B, continuing y testimony, referring to exhibit B as now marked, I testify as they re the original tax receipts, these show the amounts of the assess- ments that were made as a basis for the levy of tax at whatever rate e tax happened to be, and the amount of tax paid for the respective ars from 1907 inclusive down to 1914 inclusive. The first of these urns—no, from 1908 down, they commence and include assess- ments in other states. These assessments were made by cer-

144 tain local assessors on stocks of Cream of Wheat that we found within their jurisdictions independent of its situs. Most of these taxes we have paid under protest and claimed that we were not assessable on the ground that the property was in process of interstate commerce, that is, in some instances, to save the question but generally we have paid the tax because generally it was cheaper to pay the *the* tax than it was to fight it. We fought one assessment I think in New York so they stopped assessing us down there. We have these different warehouses into which we put goods for the purpose of delivery upon orders that are sent to Minneapolis. The commerce we claim is interstate and it makes a quicker delivery, that is all. That question has never been threshed out so far as the Cream of Wheat Company is concerned, but I thought it was important to save the question. In Massachusetts, Montana, Kansas City, St. Lake City, Portland, Maine, also these taxes have been paid, so that so far as I know all the tangible property of the company has been included in some assessment and they have paid taxes upon it during all these years, during 1908 to 1914 inclusive, wherever situated, and no such property either personal or real has during any of these years been located in North Dakota. I think that is all.

Mr. Carson: Defendant at this time offers in evidence defendant's exhibit B in connection with the testimony of Mr. Brown.

Mr. Carson: You may cross examine.

Mr. Burtness: Objected to as incompetent, irrelevant and immaterial, throwing no light upon the issues involved in this law suit. There is no objection because of the fact that it isn't the originals because it is a summary of other tax receipts, etc.

145 Mr. Brown: Yes, just the same as though the original tax receipts were offered.

Mr. Burtness: There is no objection because it is a copy or summary, but the objection goes to the irrelevancy and immateriality of the evidence purported to be shown by the exhibit.

Mr. Carson: No objection as to foundation so far as identification is concerned.

The Court: No, he hasn't objected on that ground.

Mr. Burtness: There is no cross examination at this time. We would like to reserve the right to cross examine later depending upon what upon what evidence is shown by the defendant.

Mr. Carson: If it pleases the court, if we have anything more to offer it will be very short, and I suggest if it meets with the approval of the court that we adjourn at this time until tomorrow morning and probably save time in that way.

Adjournment is now taken until 10 o'clock A. M.

146 March 30th, 1917, at 10 o'clock A. M. case called pursuant to adjournment.

Mr. Brown: May it please the Court, Mr. Madison, the reporter had another engagement this morning, and Mr. Kilgore has taken his place by consent of counsel; that's understood, Mr. Burtness?

Mr. Burtness: Certainly.

Mr. Burtness: Mr. Brown, yesterday on direct examination you gave the par value of the capital stock of the defendant corporation. You didn't mean to imply that that was either the market value or the actual value thereof, did you?

A. I meant to imply only that that was the face, par value of the stock.

HANS ANDERSON, sworn, testified as follows:

Examination by Mr. Carson:

Q. Your name is Hans Anderson?

A. Yes sir.

Q. You are the County Auditor of the Plaintiff County?

A. Yes sir.

Q. Were you such County Auditor continuously during the year 1914?

A. Yes sir.

Q. Calling your attention to plaintiff's Exhibit 1, the same being page 18 of the Auditor's Escaped Property Book A of records of your office—I will ask you to state whether or not you are the man who made the entries which appear on this page 18?

A. No, that was made at my direction, but it was made by the deputy.

Q. They were made under your direction?

A. Yes sir.

Q. And in the Auditor's office of the plaintiff County?

A. Yes sir.

Q. Now, also calling your attention to Plaintiff's Exhibit 2, and Plaintiff's Exhibit 3, the same being pages 92 and 96 respectively, of the 1914 assessment book, Personal No. 4, of the City Assessor of the City of Grand Forks—I will ask you to state whether or not this book 1914 Assessment book Personal No. 4, of the City Assessor was on file in your office at the time these entries were made in your office, under your direction?

A. I can't swear positively that it was.

Q. Will you swear that it was not?

A. I can't swear positively.

Q. I will ask you to refresh your recollection by referring to the entries in the last column of Plaintiff's Exhibit 1, which entries say: "See Assessor's Slips," and ask you, after refreshing your recollection, if it is not a fact that the entry on Plaintiff's exhibit 1, which was made at your direction was made after these entries by the City assessor were made?

A. I can't swear positively to that either.

Q. At the time these entries were made on Plaintiff's Exhibit 1, under your direction, did you not have before you the six slips which are now pinned on Plaintiff's Exhibit 1?

A. It would appear so, from the notation across there; and from the slips attached.

Q. Those indicate that they were made out from the slips of the City Assessor of the City of Grand Forks?

A. Yes sir.

Q. You had those six slips that were attached?

A. I can't swear positively that they were, but from the appearance of the remarks here, and being attached, it would appear that they were, but I can't remember whether they were or not.

Q. You can't think of anything that this explanation "See Assessor's Slips" referred to, unless it referred to these six slips that were pinned on here?

A. No.

Q. These six slips that appear on Plaintiff's Exhibit 1, being six slips made by the City Assessor of the City of Grand Forks, for the attempted assessment for the back years 1908 to 1913 inclusive?

Mr. Burtness: Objected to as assuming facts not in evidence, and an improper fact under the laws of this state, because it is plain that the assessment was not made from any assessment slips, but was made from the assessment roll.

A. Yes, I think they are, although they are only one of the blanks we use for making up estimated assessments.

Q. And these entries on Plaintiff's Exhibit 1: "See Assessor's Slips" refer to these six slips by the City Assessor?

A. Yes sir.

Q. Mr. Anderson, I will ask you to state whether the Tax Commission gave you any instructions with reference to making this assessment?

A. I had a talk with I think—two members of the Tax Commission, on this proposition. That's my recollection, I talked to Mr. Wallace and Mr. Birdzell.

Q. And did you receive any letters from the Tax Commission concerning this attempted assessment?

A. Not to my knowledge, no sir.

Q. The matter was all handled by conversation?

A. I think so.

Q. Between yourself and these two members of the Tax Commission?

A. Yes, as far as I remember.

Q. What did they tell you to do in the matter?

Mr. Burtness: Objected to as incompetent, irrelevant, immaterial, throwing no light on the issues in this matter.

A. We talked it over, and I thought it was my duty as County Auditor of Grand Forks County to assess property for escaped taxation, and that this was one item which had escaped, and I assessed it.

Q. They told you to make the attempted assessment, didn't they?

A. I don't remember that they told me that I had to do it, but I thought it was a part of my duties to assess the property for escaped taxation.

150 Q. Did they tell you anything about the figure at which you should assess the property for escaped taxation? Did they tell you anything about the figure at which you should assess the Company?

I don't remember; we may have talked about certain figures in the proposition, but I don't remember.

Q. Well, just tell us how you arrived at this figure of \$50,000 which you used in making this attempted assessment, which appears in Plaintiff's Exhibit 1.

A. I talked it over with the members of the tax Commission and the Assessor, and they had no statement from anybody to make it in; it was an estimated assessment from the facts as near as I could get them.

Q. You didn't either make out yourself, or have made out, any entries, except the entries that appear on Plaintiff's Exhibit 1, did you, in making this attempted assessment for the back years, 1908 to 1913, inclusive, against this Company?

A. That's all the figures that were made, as far as the assessment was concerned.

Q. You didn't make out and file any statement under Section 100 of the Compiled Laws of the State of North Dakota, 1913, did you?

A. I didn't understand that I had to?

Q. Well did you, or did you not?

A. I didn't understand that I had to.

Q. Well the question is whether you did or didn't?

A. I did not.

Q. You didn't go through any process of calculating the market value of the Company's stock?

A. No.

Q. Or you didn't go through any process of calculating the actual value of the Company's stock?

A. No, it was just an estimate.

Q. You didn't go through any process of calculating the indebtedness of the Company, except the indebtedness for current indebtedness?

A. No, I had no basis to work on.

Q. Or in calculating the value of the real estate, did you?

A. No.

Q. You didn't go through any process of calculating the value of the personal property of the company did you?

A. No.

Q. You didn't take any of these things into consideration in making this assessment, did you?

A. Well, I had no figures to work on, and I couldn't.

Q. You say that you conferred with the Tax Commission and the City Assessor about the figure of \$50,000?

A. Yes sir.

Q. What did the assessor tell you?

A. He said that he had written the Company, and got no statement from it on which to base an assessment, and he talked about rumors that he had heard about the value of its stock.

Q. And you didn't check up yourself anywhere, as to that figure of \$50,000, except with the City Assessor and the Tax Commission, did you?

A. No, I had no way of verifying it.

Q. What did the Tax Commission tell you about that figure of \$50,000, if anything?

A. I don't remember now that they told me anything about it. I don't know that they instructed me to use those figures; they were my own figures.

Q. Then the only sources of information from which you obtained this figure of \$50,000 was what the City Assessor of Grand Forks told you, is that right?

A. That, and rumors of what the corporation was worth, and the dividends paid.

Q. I understand you to say that you didn't check up the value of this stock, except with the City Assessor of the City of Grand Forks and the Tax Commission?

A. I had no figures to check from.

Q. You didn't check up with anybody except the City Assessor and the Tax Commission?

A. Except from reports furnished by the City Assessor, and from hearsay.

Examination by Mr. Wallace:

Q. As a matter of fact, didn't you bring this matter to the attention of the Tax Commission, rather than the Tax Commission bring the matter to your attention?

153 A. No, I think it came up from the assessor to me. I think that he mentioned that he had had correspondence, or had talked it over with the tax commission; that's how it came to me, and then you and Birdzell dropped into the office.

Q. As a matter of fact we were in town on other business, and you brought the matter up with us?

Mr. Carson: Objected to as leading.

A. Yes.

Q. The final figure as placed in your record that you have referred to this morning, as a matter of fact, was equalized by the Board of County Commissioners, and is their figure, rather than the Auditor's figure, is it not?

A. It was equalized by the County Board, yes sir.

Q. And when you placed the figure of \$50,000 in the records, that was more of a tentative figure, and based upon the very best information at your disposal, was it not?

A. Yes sir.

Q. And did you know at that time, that the City Assessor of Grand Forks had asked the defendant company for the information required by law, and that it had been refused to him?

Mr. Carson: Objected to as immaterial.

A. I talked it over with him, and he informed me of that fact.

154 Q. Did the City Assessor tell you likewise as to his effort to get the information out of the resident officers of the corporation?

Mr. Carson: The same objection.

A. Yes sir.

Q. You knew as a public official, did you not, Mr. Anderson, that there was no real property or personal property assessed against the defendant corporation in this county?

A. I knew that there was no personal, because I looked that up.

Q. And that there hadn't been any personal property tax assessed against the defendant corporation for the years 1908 to 1913?

A. That's true, according to the records.

Examination by Mr. Brown:

Q. Mr. Anderson, you understood that the only request for information made to the company for the purpose of getting items under Section 2110 were made by the City Assessor?

A. Yes sir.

Q. So far as you knew, neither you or your office or anybody under your direction, nor the Tax Commission had made any request from the Company for information?

A. Not from our office that I know of; I had no report from the tax commission that they made any request.

Q. Then you are certain that there was no request made to the company for information from your office?

A. Yes sir.

155 Q. And so far as you know, or have been informed, there was no request made from the Tax Commission for information?

Mr. Burtness: Objected to as incompetent, irrelevant, immaterial, and calling for a conclusion of the witness.

A. Not to my knowledge.

Q. When you made this assessment your intention was, and that of your office, to make an assessment under Section 2110 of the Compiled Laws of North Dakota, 1913? Your intention was to make a return under that section?

A. Under that and other sections. It was escaped taxation.

Q. But it was a tax upon the property, and the manner of assessment providing for assessment of property of intangible value?

A. Yes sir.

Q. Did you read the statute at that time?

A. Yes sir.

Q. Did you note in the statute that in case of the refusal of the company in question to make a return or statement, which included the items—the seven items, that the statute made it the duty of the assessing officer, whoever it should be, to make that return and statement?

A. Yes, but I understood that to mean the assessor and not the county auditor in assessing escaped property.

Q. You didn't understand that in making any assessment for any particular year under section 2110 that it must be made up

156 and computed on a statement with items as provided in that section?

A. I didn't understand that the County Auditor had to do that: as I understood it, the assessor was supposed to get it if possible, and file a statement with the County Auditor, which he didn't do.

Q. He didn't do it?

A. No.

Q. Neither by yourself or your office, nor by the assessor nor by anybody, so far as you know, was a return or statement provided for in Section 2110 made out?

Mr. Burtness: Objected to as incompetent, irrelevant and immaterial, particularly in view of the undisputed evidence shown by this record that the information required in this matter was asked for of the defendant company, and by the defendant company refused; hence there was no further obligation on the part of any of the assessing officers of the City or County of Grand Forks to make out such statement.

A. No sir.

The Court: These questions you have been asking recently refer particularly to the six years prior to 1914 that had escaped taxation?

Mr. Brown: I had those in mind.

Examination by Mr. Wallace:

157 Q. Mr. Anderson, at the time you made the records—the entries in the records in plaintiff's Exhibit 1, which is the record of property escaping taxation, state whether or not at that time you were acquainted with the facts testified to by the assessor in this case, that he had been unable to get any statement out of the defendant corporation by application to the corporation itself, and by an application to its local resident officials?

Mr. Brown: Objected to as immaterial; because now we are talking about escaped taxation, and there is no evidence that the company was ever requested to make any statement for the years 1908 to 1913 inclusive; in fact the evidence now is that they were not so requested, and it is only in case of failure or refusal of the company to make a return that any assessment in any manner is authorized by the statute under section 2110, and then if the statute authorizes an attempted assessment it only authorizes it in that form, by return and statement as authorized by the statute. In an event, none of the proceedings under the statute were complied with so far as the back taxes were concerned; we claim the same thing for 1914, but we are not talking about that now.

A. I was so informed.

158

Stipulation.

It is stipulated between the parties that the defendant's answer to the original complaint shall stand and be considered as defendant's

answer to the amended complaint which the Court permitted Plaintiff to file yesterday, without waiving our objection to the allowance of the amendment.

Mr. ROME G. BROWN recalled for further

Cross-examination.

By Mr. Burtness:

Q. Mr. Brown, if a request had come from the City Assessor during the year 1914, asking specifically for statements under the provisions of Section 2110 Compiled Laws of 1913, for the status of the Company, particularly for the years 1908 to 1913 inclusive, would such statement have been furnished, or would you have refused to furnish the same?

A. I will say frankly to you, Mr. Burtness, that I am not accustomed to giving opinions which concern particular clients, to outside persons, on questions that I have not passed upon. The only thing I can say is that what did come to me was a request for a statement for the year 1914 for these items, and for taxes for 1914, and I advised the Company that they didn't have to make that return.

159 What I would have done if a request had come for the other years I cannot tell you, because that question was never presented to me, and in fact I would refuse to disclose what might be my opinion given to a client that was never propounded by the client, if the question should arise. I am not paid for that kind of advice.

Q. Do you suppose for an instant that a statement would have been furnished for the year 1913, and not for the year 1914?

A. I am not prepared to say what action they would have taken. They do not always follow my advice.

Q. You are in charge of these matters?

A. What matters I am in charge of, including actions is subject to the approval of the managing officers of the company.

Q. As to tax matters, and as to returns of the various jurisdictions, that would pertain to tax matters, you were in absolute charge; do I understand you correctly?

A. I was in charge of these matters as general counsel of the company, particularly acting upon them, but in those matters, as well as in all matters, subject to the action and control of the head of the department, or the superior officers of the company.

Q. Does any reason now appeal to you why you should have furnished a statement for the years 1908 to 1914, and refused a statement for the year 1914, if such a—

160 Mr. Carson: Objected to as calling for a conclusion of the witness.

A. Ordinarily I would refuse to answer the question. But I was not asked to investigate that question. I will say that I cannot now see any reason why I should have advised them to do it, although I don't know whether they would have followed my advice or not.

Q. In other words, your judgment would have been the same with

reference to furnishing a statement for the years 1908 to 1913 inclusive as it was with reference to furnishing a statement for 1914?

Mr. Carson: Objected to as improper cross examination and immaterial.

A. Might have been the same; whether my conclusion would be based upon the same or for other reasons I cannot now tell.

Q. In all probability if a request had come to you, either from the City Assessor of the City of Grand Forks, or the County Auditor, for a statement for the years 1908 to 1913 inclusive you would have advised your client to refuse to furnish such statements, the same as you did the statement for the year 1914?

Mr. Carson: The same objection.

A. I can't state whether I would or not. I am now talking in the capacity of a witness, not as a lawyer.

161 Defendant rests.
Plaintiff rests.

The Court: At the opening of this case it was understood that the case was to be tried as an equitable action, and no rulings have been made upon motions made or objections to the introduction of evidence, and the case has been tried upon that theory throughout.

Mr. Burtness: And it is expressly understood that both sides expressly waive any objections to the fact that it has been so tried, but each side reserves all rights acquired by it by the objections interposed in any part of the record.

Testimony closed.

Mr. Carson: May it please the court, the defendant at this time moves for a dismissal of this action on the following grounds:

First. That the State of North Dakota, or any of its subdivisions has no power or jurisdiction to levy a tax against this Company for the following reasons. It has no property, either real or personal within the jurisdiction of the State of North Dakota. It is admitted by the plaintiff that all of the attempted taxes involved in this action were attempted to be levied under Section 2110 Compiled Laws, North

162 Dakota, 1913. That section provides for a tax on the capital stock of corporations. In brief, the argument of the defendant on this point is that this is a tax not on the franchise of the Company, but a tax on its property, and that inasmuch as the State of North Dakota could not tax either tangible property beyond its borders, or intangible property which has been given a business situs beyond its borders, that therefore, this being a property tax and not a franchise tax, they cannot do indirectly under this statute what they are prohibited from doing directly, and that to sustain any tax either for the current year 1914, or any of the years 1908 to 1913 inclusive against the capital stock of this corporation, would take the property of the defendant without due process of law, contrary to the

Constitution of the State of North Dakota and the 14th Amendment of the Constitution of the United States.

The second point for a dismissal, is that the undisputed evidence shows that as to the years 1908 to 1913 inclusive, no request was ever made from the defendant for a statement, under Section 2110 of the Compiled Laws of North Dakota, and that the request for such a statement from the defendant is a condition precedent to any assessment under Section 2110.

Third. That no matter by whom this assessment under section 2110 is required to be made, it was necessary—and this applies both to the current year 1914, and to the other years—it was a condition precedent, either when the Company refused to make out the statement for the current year 1914, under section 2110, or when no request was made for the statement whatever for the years 1908 to 1913 inclusive, the only way that an assessment could be made under section 2110, no matter by whom the assessment was made, would be for the assessing officer to make out the special statement requested or required under section 2110, its jurisdiction to any tax being levied under section 2110.

The next ground for a dismissal is that if this assessment was made by the City Assessor of the City of Grand Forks for the year 1914 or for the back years, he failed to affix to Personal Property Assessment Book No. 4, in which the attempted assessments appear, any affidavit in the form required by the laws of the State of North Dakota, and he did not in fact, the evidence shows that he did not in fact swear to that assessment roll in which these particular attempted assessments were contained. The point in this connection being that the undisputed evidence shows that he did not in fact swear to the assessment roll in which these attempted assessments were contained, and if the testimony should be construed that he did take an oral oath, it was not in the form required by law.

As a further ground for dismissal—that the City Assessor of the City of Grand Forks is absolutely without power under the law of the State of North Dakota to make any assessment whatever for back years; his power was confined solely to make assessment if at all, for the current year 1914.

The next ground for a dismissal: If this assessment was made by the Auditor of Grand Forks County under Section 2217, Compiled Laws North Dakota; that section is unconstitutional in that it nowhere provides for the giving of any notice to the property owner who is attempted to be assessed. This statute not providing for any notice of an attempt to assess for back years, violates both the due process clause of the North Dakota Constitution, and the due process clause of the Fourteenth Amendment of the United States Constitution.

For a further ground: In case this assessment was made by the county auditor, as plaintiff claims. Section 2217, the only statute which attempts to authorize the Auditor to act—the undisputed evidence in this case shows that at the time the Auditor attempted to act, there had been made on the books of the City Assessor of Grand Forks, an attempted assessment for the years 1908 to 1913

inclusive. This assessment has not been set aside by the
165 judgment of the court. The only conditions under which
the Auditor could make an assessment under Section 2217
if at all, in case the property had been omitted during the previous
year, or the judgment of the taxes had been set aside. Neither of
the two conditions under which the County Auditor could have acted
in this case existed, and he had no power to make an assessment.

Next: Section 2217 is confined by its terms to real property and
tangible property. It does not authorize any assessment for back
years of intangible property. The Auditor therefore, had no statu-
tory power under the laws of the State of North Dakota to back
assess intangible property.

Next: Even if the Auditor had statutory authority to back assess
intangible property, he would be required to make out a special
statement provided for by section 2110, and also be required to—as
a condition precedent, before making an assessment under that
section, to demand that the company make out returns under Section
2110.

For a further ground: Under the evidence as it now stands, it shows
that the only assessment which was attempted in this case was made
by the Tax Commission of North Dakota, acting through the city
assessor of the City of Grand Forks. The evidence shows that this

166 was a direct assessment by the Tax Commission of the State
of North Dakota, and under the laws of the State of North

Dakota the Tax Commission has no power to make a direct
assessment. It violates that provision of the North Dakota Consti-
tution which provides that property shall be assessed in the taxing
district in which it is located. Furthermore, the sole power of the
Tax Commission, as far as back assessments are concerned—under
subdivision 19, section 9, Chapter 303, North Dakota Laws, 1911,
their sole power as far as back assessing property is concerned, is
confined to this: They may require local assessors to place upon the
assessment rolls property which may have escaped taxation during
the previous six years, and is available and remaining within the
taxing jurisdiction.

The undisputed evidence in this case shows, and it is admitted by
the plaintiff, that the attempt here is to assess intangible property.
The Tax Commission had no power to compel a back assessment of
anything except tangible property, and then it must be available
and remaining within the taxing jurisdiction. It has no application
whatever to assessment for back years on intangible property.

As a further ground: The attempted assessment by the Tax Com-
mission, acting either through the City Assessor of the City of Grand
Forks, or the County Auditor of the plaintiff county of the
167 back years 1908, 1909 and 1910, would be unconstitutional
because the law creating the Tax Commission was enacted in
1911; the same would be retroactive and unconstitutional.

For a further ground: That under no circumstances could the
County Auditor make an assessment for back years, for the reason
that he has no authority under the statutes of the State of North
Dakota to back assess property, the sole and only means of back

I do solemnly swear—affirm—that I
as, shares and credits, subject by law to
quired to be listed by me for another
ministrator, receiver, cashier, accounting
olegde.

City
Sec. Twp. R.

Assessor will clearly indicate here
as required by Secs. 1519 and 1520
of 1903 Code, the particulars under
the heads "Refused to list," "Re-
fused to swear," "Absent," or
"Sick."

GRAIN REPORT.

Bu. Wheat

Bu. Flax

Bu. Oats

Bu.

Bu.

Bu.

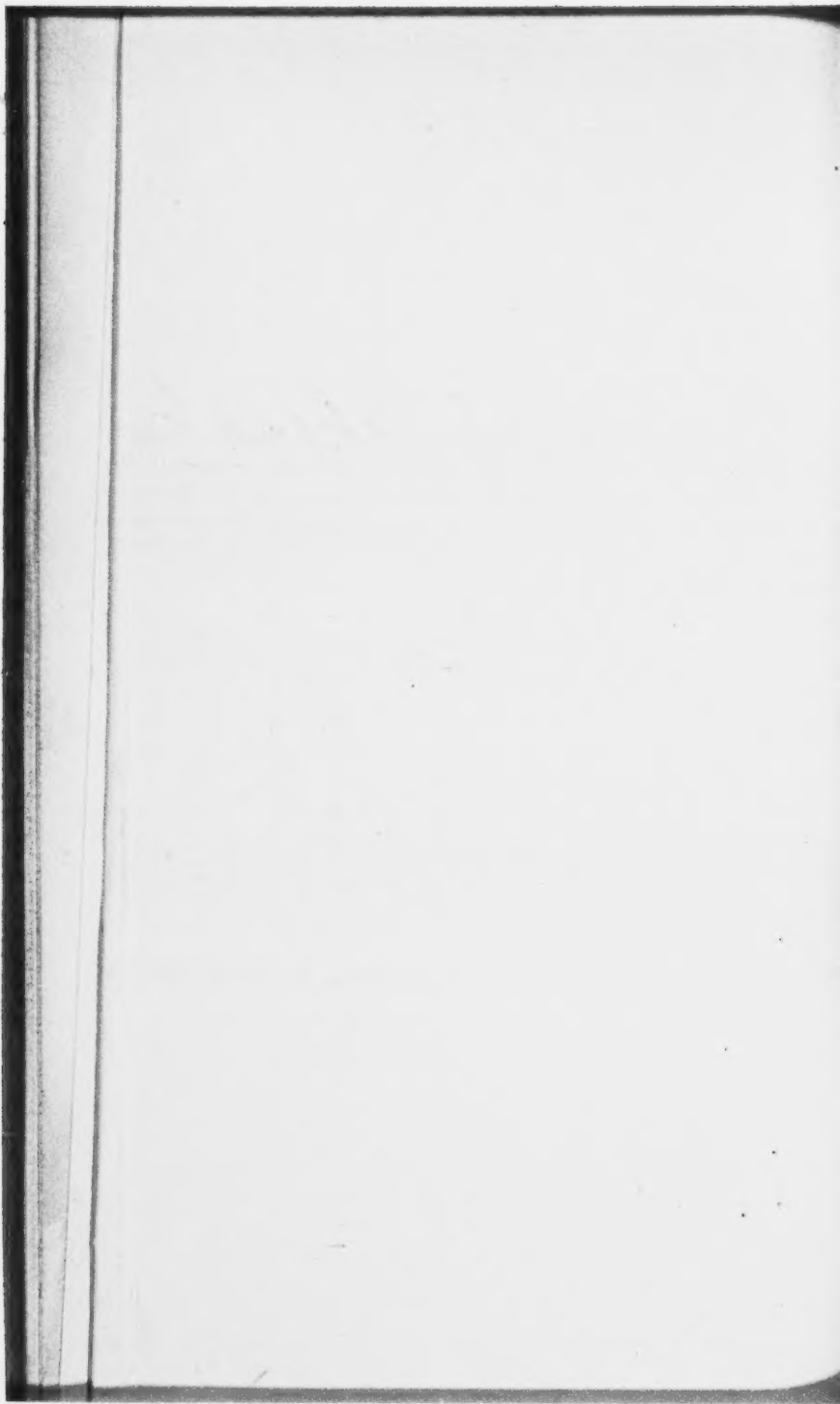
7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28											
Real Estate Machinery, Tools and other Musical Instru- ments No.	Piano Fortes No.	Household Furniture	Agricultural Tools, implements and Ma- chinery	A—Separators, run by steam engine	B—Separators run by Gas Engine	C—Steam Threshing Engines and Boilers	D—Gas Engines	Gold and Silver Plate and Plated Ware	Diamonds, Watches and Jewelry	Franchises, Annuities, Royalties, Patent Rights	Steamboats and Ve- hicles of every descrip- tion	Goods and Merchan- dise	Manufacturers' Ma- terials and Manufac- tured Articles	Manufacturers' Tools, implements and Ma- chinery, Inc. Engines and Boilers	Monies other than that of Banks, Bank- ers or Brokers	Credits other than that of Banks, Bankers or Brokers	Bonds and Stocks other than Bank Stock	Shares of Bank Stock	Shares of Capital Stock Foreign Companies and Associations	Stock and Furniture of Sample rooms, Eat- ing Houses, Billiard and Similar Tables	A—Elevators	B—Warehouses and all others	Bu. Cap'y	Bu. Cap'y	Floor mills over 100 bbls. capacity	Floor mills less than 100 bbls. capacity	Improvements, except Plowing on U. S. or K. R. Lands	A—Gas and Water Mains and Pipes	B—Electric Light Plants	C—Waterworks Systems	All other Property not included in preceding twenty-seven items	TOTAL
																		50000														

MUST be filled out, and must be signed by the party assessed.

(#864)

F. L. Smith
Assessor

169



1. Cream of Wheat Co.

have listed above and within all the personal property, money, stocks, shares, real estate, and owned, used, possessed or controlled by me, or by law required of me, as a person or persons as guardian, husband, parent, trustee, executor, administrator, officer, partner, factor, bailee or agent, according to the best of my knowledge

Subscribed and sworn to before me this

Day of 5/29 1909 } Sec
Assessor. P. O.

P. O.

Subject	Page
Read Roll	
ARTICLES	
Horses one year old	
No.	
Two years old	
No.	
Three years old and over	
No.	
Stallions kept for service	
No.	
Cattle one year old	
No.	
Two years old	
No.	
Cows three years old and over	
No.	
Went Down	
No.	
All other Cattle three years old and over	
No.	
Mules and Asses one year old	
No.	
Two years old	
No.	
Three years old and over	
No.	
SHEEP	
No.	
HOGS	
No.	
A—Sleighs and Sleds	
No.	
B—Bicycles	
No.	
C—Wagons, Carriages and all other wheeled Vehicles	
No.	
D—Automobiles	
No.	
E—Mills	
No.	
F—Agricultural Machinery, Organs and other Musical Instruments	
No.	

BOTH sides of this blank **MUST**

Sec. 1 Twp. 1 R. 1

Assessors will clearly indicate here as required by Secs. 1519 and 1520 of 1903 Code, the particulars under the heads "Refused to list," "Refused to swear," "Absent," or "Sick."

GRAIN REPORT.

Bu. Wheat

8m. May

Res. Outc.

Re

1

—

1

1

1

7	Household Appliances, Yachts, Motor Cars, Automobiles, Organ and other Musical Instruments	
8	Piano Fortes	
9	Household Furniture	
10	Articulated Tools, Implements and Machinery	
11	A—Engines, run by Steam Engines B—Engines, run by Gas Engines C—Steam Threshing Engines and Boilers D—Gas Engines, etc.	
12	Gold and Silver Plate and Plated Ware	
13	Diamonds, Watches and Jewelry	
14	Franchises, Annuities, Royalties, Patent Rights	
15	Steamboats and Vessels of every description	
16	Goods and Merchandise	
17	Manufacturers' Materials and Manufactured Articles	
18	Manufacturers' Tools, Implements and Machinery, Inc. Engines and Boilers	
19	Monies other than that of Banks, Bankers or Brokers	
20	Credits other than that of Banks, Bankers or Brokers	
21	Bonds and Stocks other than Bank Stock	
22	Shares of Bank Stock	50000
23	Shares of Capital Stock of Foreign Companies and Associations	
24	Stock and Furniture of Sample rooms, Eating Houses, Billiard and Similar Tables	
25	A—Elevators B—Cap'y C—Warehouses and all other D—Cap'y E—Floor mills over 100 bbl. capacity F—Floor mills less than 100 bbl. capacity	
26	Improvements, except Paving on U. S. or A. R. Lands	
27	A—Gas and Water Mains and Pipes B—Electric Light Plants C—Waterworks Systems	
28	All other Property not included in preceding twenty-seven items	
	TOTAL	

MUST be filled out, and must be signed by the party assessed.

(864)

C-310000 26

170

Ac
ta
pe
of

d

I.

officer.

S

day of

Assessor.

P. O.

	School Poll	
	Road Poll	
	ARTICLES	
1	Horses one year old No.	
	Two years old No.	
	Three years old and over No.	
	Stallions kept for ser- vice No.	
	Cattle one year old No.	
	Two years old No.	
2	Cows three years old and over No.	
	Work Oxen No.	
	All other Cattle three years old and over No.	
3	Mules and Asses one year old No.	
	Two years old No.	
	Three years old and over No.	
4	SHEEP No.	
5	HOGS No.	
	A—Storks and Birds No.	
	B—Bicycles No.	
6	C—Wagon Carriages and all other wheeled Vehicles No.	
	D—Automobiles No.	
	M—Mans No.	
	HP—Horsepower No.	
	Yn—Machines, Organs and Musical Instruments No.	

BOTH sides of this blank MU

City
Twp.

Sec. 1 Title 1 R. 1

Assessors will clearly indicate here as required by Secs. 1519 and 1520 of 1905 Code, the particulars under the heads "Refused to list," "Refused to swear," "Absent," or "Black."

50000

MUST be filled out, and must be signed by the party assessed.

(# 864)

E. Davis
Belgian
Export

12

GRAIN REPORT:

Bu, Wheat

No. Fla.

Bu. Date _____

80.

Re:

2



Sec. _____ T P. R. _____

Assessors will clearly indicate here as required by Secs. 1519 and 1520 of 1923 Code, the particulars under the heads "Refused to list," "Refused to swear," "Absent," or "Back."

(#864)

UST be filled out, and must be signed by the party assessed.

GRAIN REPORT.

Hu. Wheat

Bus. Plan

No. _____
Date _____

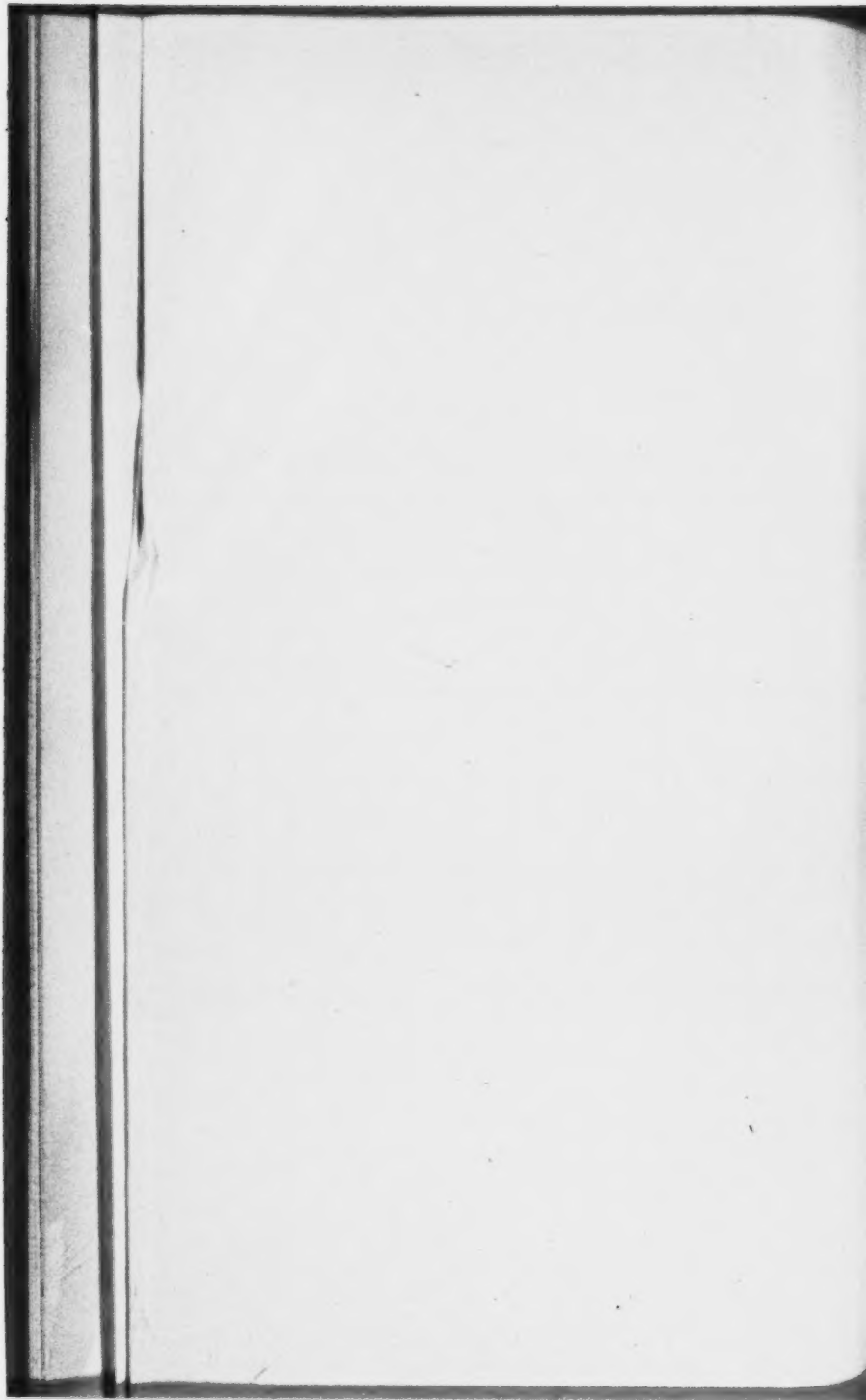
34.

2

1

21
E. Twin slabs
21
The green
report.

172



Subscribed and sworn to before me this _____
 day of _____ 1910 } _____ Sec.
 _____ Assessor. } P. O. _____

	Road Poll	
	ARTICLES	
1	Horses one year old No. _____ Two years old No. _____ Three years old and over No. _____ Stallions kept for ser- vice No. _____ Cattle one year old No. _____ Two years old No. _____ Cows three years old and over No. _____ Wort Oxen No. _____ All other Cattle three years old and over No. _____ Mules and Asses one year old No. _____ Two years old No. _____ Three years old and over No. _____ SHEEP No. _____ HOGS No. _____ A—Sleight and Sleds No. _____ B—Bicycles No. _____ C—Wagons, Carriages and all other wheeled Vehicles No. _____ D—Automobiles No. _____ Horse-drawn Vehicles No. _____ Musical Instruments No. _____	
2		
3		
4		
5		
6		
7		

BOTH sides of this blank **MUST**

Sec. 2 Dep. 2 R. 2

Assessors will clearly indicate here as required by Secs. 1519 and 1520 of 1905 Code, the particulars under the heads "Refused to list," "Refused to swear," "Absent," or "Sick."

GRAIN REPORT.

No. Wheat

Ba. Flax

Bq. Oats

Ba.

No.

3

1

Journal of Management Education 30(6)p.789-804

• • •

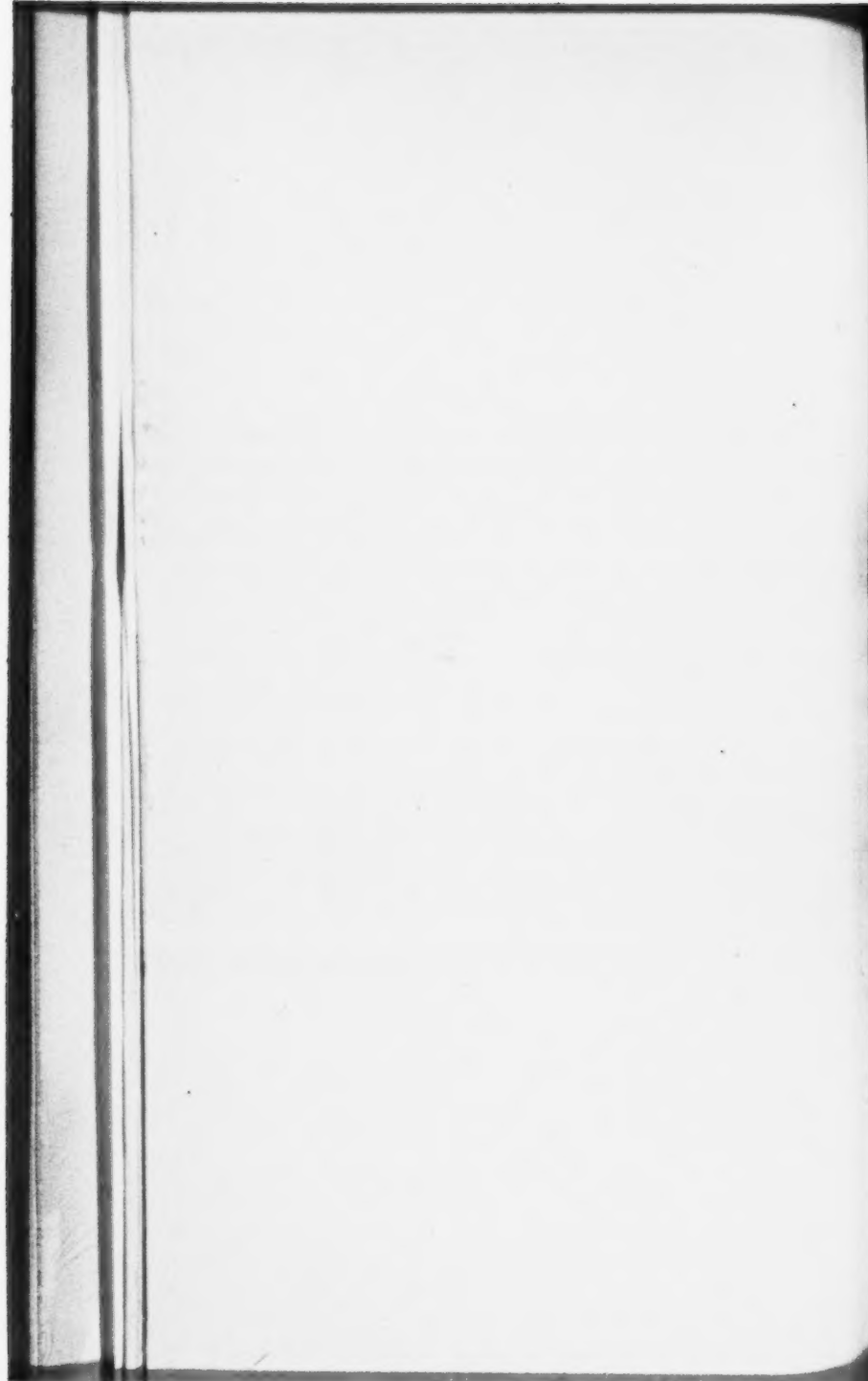
Journal of Management Education

MUST be filled out, and must be signed by the party assessed.

(*564)

E. Guin-Henry — Ch.
(See grain report).

173



Subscribed and sworn to before me this
 of 5/29 1913 L } Sec.
 Assessor. P. O.

Read Poil	ARTICLES	
Horses one year old	No.	
Two years old	No.	
Three years old and over	No.	
Stallions kept for service	No.	
Cattle one year old	No.	
Two years old	No.	
Cows three years old and over	No.	
Wort Oxen	No.	
All other Cattle three years old and over	No.	
Mules and Asses one year old	No.	
Two years old	No.	
Three years old and over	No.	
SHEEP	No.	
HOGS	No.	
A—Sleighs and Sleds	No.	
B—Bicycles	No.	
C—Wagons, Carriages and all other wheeled Vehicles	No.	
D—Automobiles	No.	
Musical Instruments	No.	
Piano Fortes	No.	

BOTH sides of this blank **MUST**

LC. do solemnly swear affirm—that I
 ey, stocks, shares and credits, subject by law to
 law required to be listed by me for another
 tor, administrator, receiver, cashier, accounting
 my knowledge.

Sec. *City* Sup. R. O.

Assessment will clearly indicate here
 as required by Sect. 1519 and 1520
 of 1903 Code, the particulars under
 this heads "Refined" is not, "Un-
 refined" or "Sweet," "Albino," or
 "Black."

GRAIN REPORT.

_____ Bu. Wheat

_____ Bu. Bar

_____ Bu. Oats

_____ Bu. _____

_____ Bu. _____

_____ Bu. _____

6	Wagons, Carriages and all other wheeled Vehicles No.	
7	Automobiles No.	
8	Motorcycles No.	
9	Household Furniture No.	
10	Agricultural Tools, Implementa and Ma- chinery No.	
11	Engines, run by Steam Engines No.	
12	Engines, run by Gas Engines No.	
13	Steam Threshing Engines and Boilers No.	
14	Gold and Silver Plate and Plated Ware No.	
15	Diamonds, Watches and Jewelry No.	
16	Franchises, Annuities, Royalties, Patent Rights No.	
17	Manufactures' Tools, Implementa and Ma- chinery, Inc. Engines and Boilers No.	
18	Money other than that of Banks, Bank- ers or Brokers No.	
19	Credit other than that of Banks, Bankers or Brokers No.	
20	Bonds and Stocks other than Bank Stock No.	
21	Shares of Bank Stock No.	
22	Shares of Capital Stock Foreign Companies and Associations No.	
23	Stock and Furniture of Banks, Banks, Bank- ers, Brokers, Bankers and Similar Firms No.	
24	Engines No.	
25	Engines and all others No.	
26	Flour mills over 100 bbl. capacity No.	
27	Flour mills less than 100 bbl. capacity No.	
28	Improvements, except those on U. S. or R. R. Lands No.	
29	Gas and Water Mains and Pipes No.	
30	Electric Light Plants No.	
31	Waterworks Systems No.	
32	All other Property not included in preceding twenty-seven items No.	
	TOTAL	

blank MUST be filled out, and must be signed by the party assessed.

(#864)

Chain
Report

174

Handwritten text, possibly a signature or title, located in the upper left quadrant of the page.

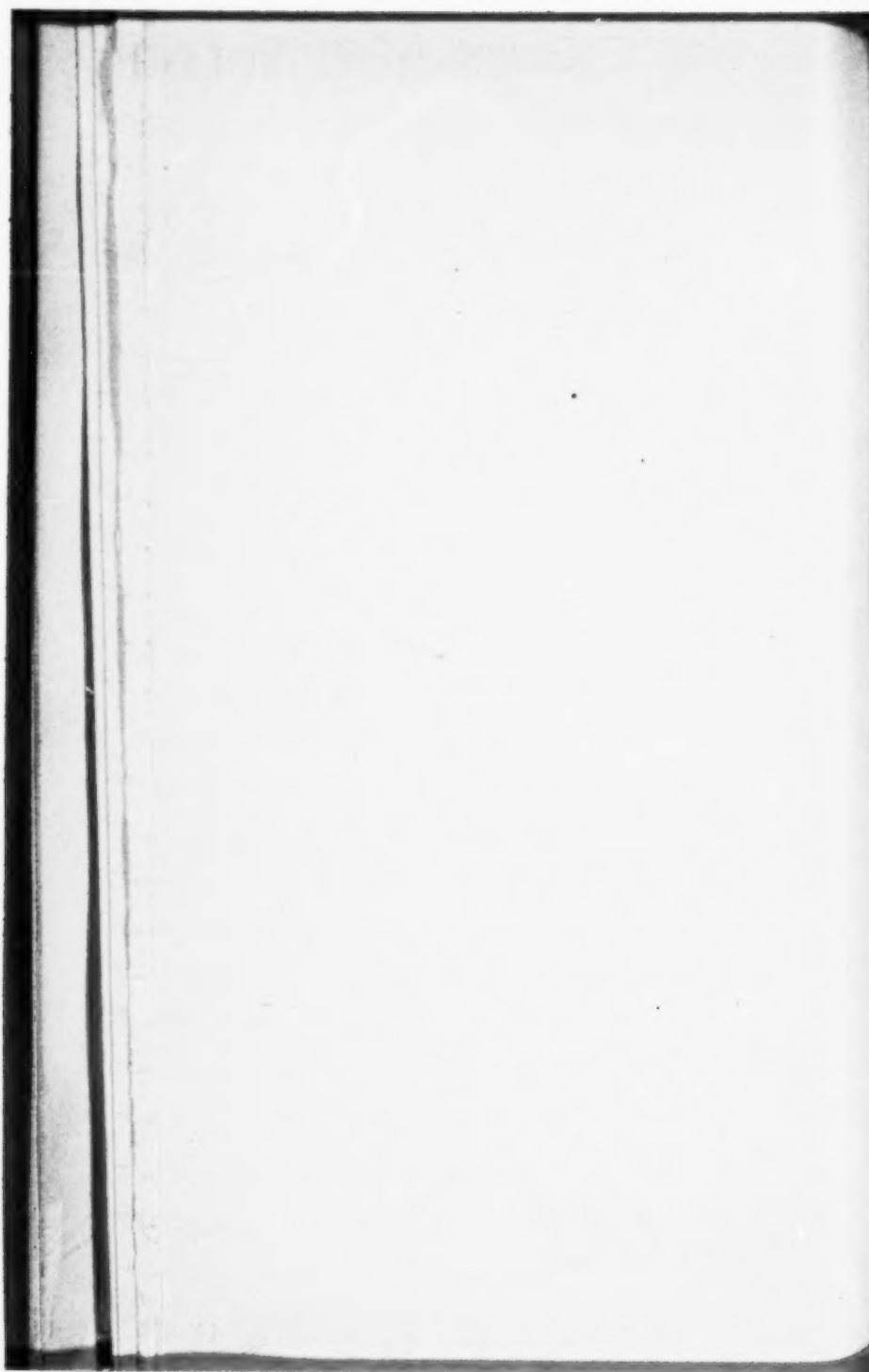
Vertical text or a small column of text located near the bottom left edge of the page.

ASSESSMENT ROLL-PR

YEAR'S TAX	NAME AND ADDRESS OF OWNER	No. School Dist.	No. Road Dist.	DES
1908	Grant of Whit Co.	1		Bonded Stock
1909	Lp	1		Lp
1910	Lp	1		Lp
1911	Lp	1		Lp
1912	Lp	1		Lp
1913	Lp	1		Lp
				Pl ^{at} a #m
/ 175				(#864)

PROPERTY WHICH HAS ESCAPED TAXATION.

[illegible]

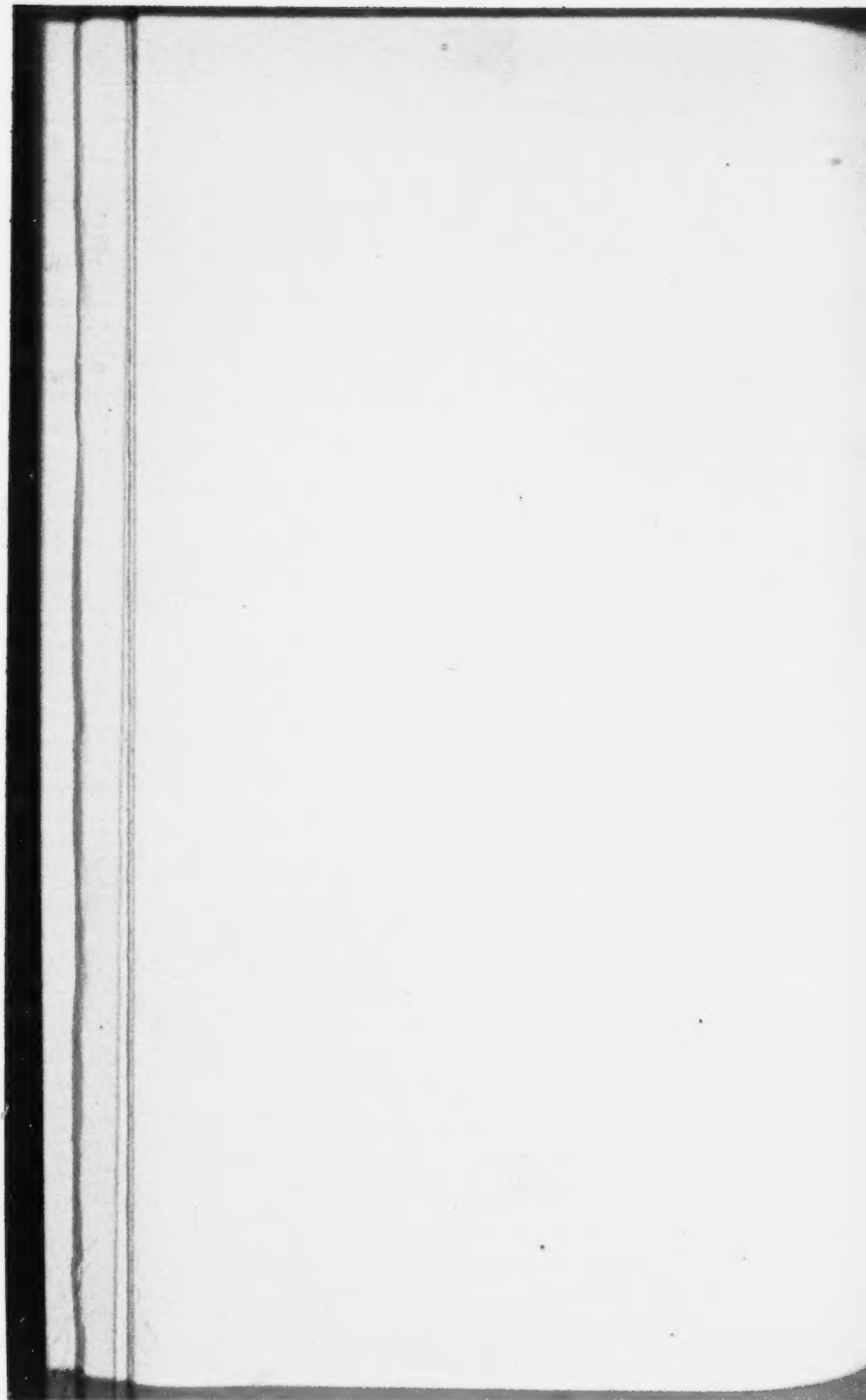


<p>NAMES OF PROPERTY OWNERS On faint blue line in alphabetical order with P. O. address and residence on the line below the name</p>	<p>No. of School District</p>	<p>SCHOOL POLL</p>	<p>ROAD POLL</p>	<p>Net Assessed Valuation Less \$10 Legal Deductions</p>	<p>Total Value as Equalized by the State Board</p>	<p>Total Value as Equalized by the County Board</p>	<p>Total Value as made by the County Board Review</p>
Change by State Board—Per Cent. 1.5							
Change by County Board—Per Cent. 1.5							
				Dollars	Dollars	Dollars	Dollars
<p>Number of animals and articles on red line 1.5 only. Valuation on next line below</p>							
<p>P. O. Address:</p>							
Residing on	Sec	Twp	R				
<p>P. O. Address:</p>							
Residing on	Sec	Twp	R				
<p>P. O. Address:</p>							
Residing on	Sec	Twp	R				
<p>P. O. Address:</p>							
Residing on	Sec	Twp	R				
<p>P. O. Address:</p>							
Residing on	Sec.	Twp.	R.				
<p>P. O. Address:</p>							
Residing on	Sec	Twp	R				
<p><i>cream of wheat Co.</i></p>							
<p>P. O. Address:</p>							
Residing on	Sec	Twp	R				
<p>P. O. Address:</p>							
Residing on	Sec	Twp	R				
<p>Total Numbers</p>							
<p>Assessor's Footings</p>							
<p>Town Board's Footings</p>							
<p>County Board's Footings</p>							
<p>State Board's Footings</p>							

5000050000

(# 864)

76



assessing property is the provision contained in subdivision 19 of Section 9, Chapter 303 of the Laws of the State of North Dakota, 1911; that is the provision which requires local assessors to place upon the assessment roll property remaining within the jurisdiction of the county. That section requiring local assessors to back assess operated to repeal Section 2217, and at the particular time when these assessments were made, the County Auditor had no power to back assess for any of these years.

The defendant moves for a dismissal on each and all of the foregoing grounds particularly specified.

Mr. Burtness: Which motion is resisted by the plaintiff.

168 STATE OF NORTH DAKOTA,
County of Grand Forks, ss:

I hereby certify that the within and foregoing is a true and correct transcript of my original shorthand minutes and that it contains a full, true and complete transcript of all matters and things which it purports to contain.

A. F. MADISON,
*Official Stenographer, First Judicial District,
State of North Dakota.*

(Here follows reproduction of blank forms marked pages 169 to 177, inclusive.)

178

Certificate.

STATE OF NORTH DAKOTA,

County of Grand Forks, ss:

I, W. H. Alexander, City Auditor of the City of Grand Forks, North Dakota, do hereby certify that the Real Estate and Personal Property assessments as contained in Books Numbers 1, 2, 3, 4 and 5, of the Real Estate and Personal Property assessment books of Grand Forks City, North Dakota, for the year 1914, are true and correct as assessed by the city Assessor and equalized by the Board of Equalization for Grand Forks City for the year 1914.

Witness my hand and the seal of said city this twenty-seventh day of June, A. D. 1914.

[SEAL.]

W. H. ALEXANDER,
City Auditor.

(Pltf.'s Ex. 4.) (A. F. M.)

179

Assessor's Return Oath.

STATE OF NORTH DAKOTA,

County of Grand Forks:

I, M. J. Londergan, Assessor of the City of Grand Forks, in said County and State, do solemnly swear that the value of all property, money and credits of which a statement has been made and verified by the oath of the person required to list the same, is hereby truly returned as set forth in such statement; that in every case where I have been required to ascertain the amount of value of property of any person or body corporate, I have diligently and by the best means in my power, endeavored to ascertain the true amount of value and that, as I verily believe the full cash value thereof is set forth in the above returns and that in no case have I knowingly omitted to demand of any person of whom I was required by law to list, nor have I connived at any violation or evasion of any of the requirements of the law in relation to the assessment of property for taxation.

M. J. LONDERGAN.

Subscribed and sworn to before me this 1st day of June, 1914.

[SEAL.]

W. H. ALEXANDER,
Auditor of Grand Forks City, N. D.

(Pltf.'s Ex. 5.) (A. F. M.)

180

Certificate.

STATE OF NORTH DAKOTA,
County of Grand Forks, ss:

I, W. H. Alexander, City Auditor of the City of Grand Forks, North Dakota, do hereby certify that the Real Estate and Personal Property assessments as contained in Books Numbers 1, 2, 3, 4 and 5, of the Real Estate and Personal Property assessment books of Grand Forks City, North Dakota, for the year 1914, are true and correct as assessed by the city Assessor and equalized by the Board of Equalization for Grand Forks City for the year 1914.

Witness my hand and the seal of said city this twenty-seventh day of June, A. D. 1914.

[SEAL.]

W. H. ALEXANDER,
City Auditor.

(Pltf.'s Ex. 6.) (A. F. M.)

181

Assessor's Return Oath.

STATE OF NORTH DAKOTA,
County of Grand Forks:

I, ———, Assessor of the City of Grand Forks, in said County and State, do solemnly swear that the value of all property, money and credits of which a statement has been made and verified by the oath of the person required to list the same, is hereby truly returned as set forth in such statement; that in every case where I have been required to ascertain the amount of value of property of any person or body corporate, I have diligently and by the best means in my power, endeavored to ascertain the true amount of value, and that, as I verily believe the full cash value thereof is set forth in the above returns and that in no case have I knowingly omitted to demand of any person of whom I was required by law to list, nor have I connived at any violation or evasion of any of the requirements of the law in relation to the assessment of property for taxation.

Signed March 29, 1917.

M. J. LONDERGAN.

Subscribed and sworn to before me this 1st day of June, 1914.

[SEAL.]

W. H. ALEXANDER,
Auditor of Grand Forks City, N. D.

(Pltf.'s Ex. 7.) (A. F. M.)

182

(PLTF.'S EX. 10.) (A. F. M.)

To the County of Grand Forks, North Dakota, and to the Board of Review and Equalization of the County of Grand Forks, North Dakota:

The Cream of Wheat Company objects to and protests against the attempted assessment or assessments made against it in the sum of

Three Hundred Fifty Thousand Dollars (\$350,000.) in the aggregate appearing in items of Fifty-Thousand Dollars (\$50,000) each as for the years 1908, 1909, 1910, 1911, 1912, 1913, 1914, on the assessment records of the city of Grand Forks, Grand Forks County, North Dakota and on the assessment records of the County of Grand Forks, North Dakota, and asks that said attempted assessment or assessments be stricken from the records and entirely annulled and cancelled. The grounds of said Company's objection and protest are among others, the following:

1. That said Cream of Wheat Company has not now and has not had during the time covered by said attempted assessment or assessments any property within said City, County or State, nor any property available and remaining within the taxing jurisdiction;

2. That said Cream of Wheat Company during all the times covered by said attempted assessment or assessments has been subjected to taxation upon all of its property in the places where it had such property and is and has been during all said times, heavily taxed upon all its property, and that any assessment or taxation under any assessment in said City, County or State would constitute the placing upon said Company of double taxation and a double burden and subject it to an unjust charge;

3. That any assessment upon said Cream of Wheat Company would impose upon it a contribution toward the expenses of the Municipal, County and State Governments of said City and State, without the entailing by said Cream of Wheat Company upon said Governments of any part of such expense and would constitute a singling out of said Cream of Wheat Company and the placing of a burden upon it which is not placed against corporations similarly situated;

182½ 4. That said attempted assessment or assessments are unfair and unequal and unjust, and are illegal and without warrant of law and contrary to law;

5. That said assessment constitutes an attempt to take retroactive and unconstitutional action against said Cream of Wheat Company in violation of the constitution of the State of North Dakota and of the United States.

Dated July 11th, 1914.

CREAM OF WHEAT COMPANY,
By BROWN & GUESMER,
Its Attorneys.

Endorsed: Protest to Assessor of Stock of the Cream of Wheat Co. Auditor's Office, Document No. 1446. Grand Forks, N. D. Filed July 11th, 1914. Hans Anderson, Co. Aud. No action taken by board July 15, 1914.

(Here follows reproduction of blank forms marked pages 183 and 183½.)

Tax List of *Personal*

NAME

1

2

3

4

5

6

7

8

*Stream of Wheat Co.
City*

(GK)

183

(864)

Tax List of *Personal*

Property in City

		DESCRIPTION		
NAME		SUBDIVISION		
beam of Wheat Co. City	1	For the year 1908		Levy 59.9
beam of Wheat Co. City	2	" " " 1909		60.9
beam of Wheat Co. City	3	" " " 1910.		55.9
beam of Wheat Co. City	4	" " " 1911.		59.6
beam of Wheat Co. City	5	" " " 1912.		59.9
beam of Wheat Co. City	6	" " " 1913.		63.1
	7			
	8			
183 1/2		July 4. 12 a.m.		
		(#864)		

Copy of Pl. Ex. 14.

PLAINTIFF'S EXHIBIT 14.

to the County of Grand Forks, North Dakota, and to the Board of Equalization of the City of Grand Forks, North Dakota:

The Cream of Wheat Company objects to and protests against the attempted assessment or assessments made against it in the sum of Three Hundred Fifty Thousand Dollars (\$350,000) in the aggregate, appearing in items of \$50,000, each as for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914, on the assessment records of said Grand Forks, Grand Forks County, North Dakota, and asks that said attempted assessment or assessments be stricken from the records and entirely annulled and cancelled. The grounds of said Company's objection and protest are among others, the following:

1. That said Cream of Wheat Company has not now and has not had during the time covered by said attempted assessment or assessments any property within said City, County or State, nor any property available and remaining within the taxing jurisdiction;
2. That said Cream of Wheat Company during all the times covered by said attempted assessment or assessments has been subjected to taxation upon all of its property in the places where it had such property and is and has been during all said times, heavily taxed upon all its property, and that any assessment or taxation under any assessment in said City, County or State would constitute the placing upon said Company of double taxation and a double burden and subject it to an unjust charge;

3. That any assessment upon said Cream of Wheat Company would impose upon it a contribution toward the expenses of the Municipal and State Governments of said City and State, without the entailing by said Cream of Wheat Company upon said Governments of any part of such expense and would constitute a singling out of said Cream of Wheat Company and the placing of a burden upon it which is not placed against corporations similarly situated;

4. That said attempted assessment or assessments are unfair and unequal and unjust, and are illegal and without warrant of law and contrary to law;

5. That said assessment constitutes an attempt to take retrospective and unconstitutional action against said Cream of Wheat Company in violation of the constitution of the State of North Dakota and of the United States.

Dated June 19th, 1914.

CREAM OF WHEAT COMPANY,
By BROWN & GUESMER,
Its Attorneys.

Def.'s Exhibit A.

The State of Minnesota,

Department of State.

Be it known, that Cream of Wheat Company a foreign corporation located at Grand Forks State of North Dakota has complied with the provisions of Section 2888-2890 Revised Laws 1905, by filing in this office a duly authenticated copy of Articles of Incorporation, a sworn statement showing amount of capital stock, and proportion of capital stock represented by its located property and business transacted in this State, and appointment of resident agent.

The capital stock of the said company is Fifty Thousand Dollars, and the proportion thereof represented in this State is Forty Thousand Dollars. Now, therefore, I, Julius A. Schmah, Secretary of State of Minnesota, do hereby certify that said Cream of Wheat Company has duly complied with the laws of this State and is authorized to do business herein, with all the powers, rights and privileges and subject to the limitations, duties and restrictions which by law appertain thereto, for the period of eight years and seven months.

Witness my official signature hereunto subscribed and the seal of the State of Minnesota hereunto affixed this twenty-seventh day of August in the year of our Lord one thousand nine hundred and eight.

[SEAL.]

JULIUS A. SCHMAHL,

Secretary of State.

		1907.	Valuation.	Tax.
At Minneapolis:				
Real Estate		\$137,940		\$4,124.12
Personal		60,167		1,750.86
			\$198,107	\$5,874.98
		1908.		
At Minneapolis:				
Real Estate		\$142,890		\$4,071.82
Personal property		60,000		1,665.00
At other places:				
State of Montana, City of Helena, Personal property			55	.70
State of Montana, Lewis and Clark County, personal property			55	.94
			\$203,000	\$5,738.44

189	1909.		
At Minneapolis:		Valuation.	Tax.
Real Estate		\$142,890	\$4,482.30
Personal property		60,000	1,800.00
At other places:			
State of Montana, City of Helena, Personal	160		1.55
State of Montana, Lewis and Clark County, Personal	160		2.72
		<hr/>	<hr/>
		\$203,210	\$6,286.57
190	1910.		
At Minneapolis:		Valuation.	Tax.
Real Estate		\$145,200	\$4,432.01
Personal property		67,725	1,977.57
At other places:			
State of Montana, County of Lewis and Clark, Personal	260		5.13
State of Montana, City of Helena, Personal	260		2.80
		<hr/>	<hr/>
		\$213,445	\$6,417.51
190½	1911.		
At Minneapolis:		Valuation.	Tax.
Real Estate		\$145,200	\$4,657.60
Personal Property		63,450	1,982.81
Money and credits.....		30,500	91.50
At other places:			
Boston, Mass., Personal.....	5,000		84.40
State of Montana, City of Helena, Personal	260		3.10
State of Montana, County of Lewis and Clark, Personal property.....	260		5.53
		<hr/>	<hr/>
		\$244,670	\$6,824.94
191	1912.		
At Minneapolis:		Valuation.	Tax.
Real Estate		\$152,150	\$4,950.86
Personal property		64,450	2,046.29
Money and credits.....		32,000	96.00

At other places:	Valuation.	Tax.
Boston, Mass., Personal.....	5,000	82.2
State of Montana, County of Lewis and Clark, Personal	360	7.92
State of Montana, City of Helena, Personal property	360	4.15
	<hr/> \$254,320	<hr/> \$7,187.43

192

1913.

At Minneapolis:	Valuation.	Tax.
Real Estate	\$152,150	\$5,483.39
Personal Property	67,650	2,384.66
Money and credits.....	35,000	105.00

At other places:

State of Montana, City of Helena, Personal property	600	7.25
State of Montana, Lewis and Clark County, Personal property.....	600	12.60
Boston, Mass., Personal property.....	5,000	86.00
	<hr/> \$261,000	<hr/> \$8,078.90

193

1914.

At Minneapolis:	Valuation.	Tax.
Real Estate	\$138,390	\$5,023.55
Personal property	67,150	2,367.03
Money and credits.....	140,000	420.00

At other places:

Boston, Mass., Personal Property.....	5,000	87.50
City of Portland, Maine, Personal property	500	10.60
State of Montana, City of Helena, Personal property	420	5.10
State of Montana, County of Lewis and Clark, Personal property.....	420	9.27
Kansas City, Mo., Personal property..	4,800	60.00
Salt Lake City, Utah, Personal property	800	30.64
	<hr/> \$357,480	<hr/> \$8,013.69

94

In Supreme Court, State of North Dakota.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff and Appellant,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant and
Respondent.

*Excerpt from Respondent's Brief Filed in the Supreme Court of
North Dakota, Showing that Respondent Reasserted and Urged in
that Court All of the Federal Questions Which It Had Raised by
the Record in the Trial Court.*

Division IV of Respondent's Brief in the Supreme Court of North
Dakota was in the following form:

IV.

Judgment against Defendant for Any Amount Would Violate Rights
Guaranteed by Federal Constitution.

As pointed out in the foregoing argument, and as alleged in the
answer (Appellant's brief, ff. 18-72), and as stated in defendant's
motion for dismissal at the close of plaintiff's case (Statement of the
Case, pp. 51-53) and in defendant's motion for dismissal at the close
of all the evidence (Statement of the Case, pp. 83-89), if final judg-
ment should be rendered against the defendant in this case for any
amount whatever, such judgment would have the effect to enforce
and uphold as valid statutes and laws of North Dakota and authority
exercised under the State of North Dakota, which statutes, laws and
authority as so enforced would deprive this defendant of its property
without due process of law in violation of Section 1 of Article 14
of the Amendment to the Constitution of the United States, and
deny to this defendant the equal protection of the laws in violation
of Section 1 of Article 14 of the Amendments to the Constitution of
the United States and which statutes, laws and authority as
so enforced would be retroactive in violation of Section 9 of
Article 1 of the Constitution of the United States.

195

We are confident that the judgment of the trial court will be
affirmed by this court, but we nevertheless desire to save, at all
points, the Federal questions which have been raised by the record
in this case.

196 In the Supreme Court, State of North Dakota, September Term, 1918.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff and Appellant,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant and
Respondent.

Section 2110, Compiled Laws, 1913, relating to taxation of domestic corporations and associations, provides that every such corporation and association shall be assessed for the amount which its paid up capital stock,—(as determined by the market value thereof, if it has market value, and if it has no market value, then by its actual value),—exceeds the aggregate of the values of the real and personal property owned, and the amount of the total indebtedness (except current expenses) owed, by such corporation or association.

Held, That an assessment against a domestic corporation under the rule prescribed by this section does not take the property of such corporation without due process, or deny to it the equal protection of the laws, even though all of its tangible property is located outside of the borders of the state.

Held, further that such assessment does not infringe upon any rights guaranteed to such corporation by Section 9, Article 1 of the Federal Constitution, or by Section 16 of the Constitution of North Dakota.

(Syllabus by the court.)

From a judgment of the District Court of Grand Forks County, Cooley, J., plaintiff appeals.

Reversed.

Opinion of the Court by Christianson, J.

Geo. E. Wallace of Bismarck, and O. B. Burtness of Grand Forks, for Appellant.

Brown & Guesmer, and Harry S. Carson, of Minneapolis, and Murphy & Toner of Grand Forks, for Respondent.

197

COUNTY OF GRAND FORKS

vs.

CREAM OF WHEAT COMPANY.

CHRISTIANSON, J.:

This is an action by the County of Grand Forks to recover from the defendant certain alleged delinquent personal property taxes for

years 1908 to 1914 both inclusive. The complaint alleges that the defendant is, and at all times therein mentioned, was a corporation organized under the laws of the state of North Dakota, with its principal place of business at the city of Grand Forks, in said Grand Forks County. And that in the year 1914 the county auditor under the direction of the State Tax Commission duly assessed certain property situated in said city of Grand Forks, to-wit:—"bonds and stocks" for the years 1908, 1909, 1910, 1911, 1912 and 1913, as property having escaped taxation; that such property, during each said years, had been the property of the defendant and had not been assessed; that such assessment was thereafter equalized by the board of equalization of the county and later by the state board of equalization; that such taxes were duly entered by the county auditor and by him extended upon the tax lists of said county against the personal property of the defendant for each of said years at the same rate and for all the purposes for which taxes were levied upon property in said Grand Forks County in each of said years. It is further alleged that such personal property was duly assessed by the city assessor in the year 1914, and such assessment duly reviewed and equalized as provided by law. The complaint, also, shows that the action was brought pursuant to a resolution of the county commissioners directing its institution.

The defendant in its answer admits that certain assessments as alleged in the complaint were attempted to be made, but it denies the validity thereof and sets up various defects and irregularities in the proceedings culminating in the assessments for the respective years. It also avers that during none of the years did it own or possess any property whatsoever, subject to taxation in the State of North Dakota. In that connection it is alleged that the defendant's business during all of said time consisted in the manufacture and sale of a breakfast food, commonly known as "Cream of Wheat." And that prior to 1908, it duly complied with the laws of the state of Minnesota, relating to foreign corporations and obtained a license to do business in said state, and that since 1908 and prior thereto, the defendant has continuously maintained its factory and sales office in the city of Minneapolis, in the state of Minnesota, and has maintained no factory or sales office at any other place; and that it at no time during the years in question had or owned any real or personal property subject to taxation in the state of North Dakota. The case was tried to the court without a jury. The trial court resolved all questions raised with respect to the defects and irregularities in the various assessments in favor of the plaintiff, but ordered judgment in favor of the defendant for a dismissal of the action, for the reason that it had no property subject to taxation within the state of North Dakota. The plaintiff has appealed from the judgment, and asks for a review of certain specified questions of fact.

The controlling facts in this case are not in dispute. The defendant is a corporation organized under the laws of the state of North Dakota. It was organized for the purpose, and its business consists, of manufacturing and marketing a cereal known as "Cream of Wheat." It has an authorized capital stock of \$50,000.00. The city of Grand Forks was designated in the articles of incorporation as its principal

place of business. The defendant has qualified under the laws of Minnesota relating to foreign corporations, and obtained a license to transact business in such state, and has established and maintains its factory and sales office in the city of Minneapolis, in the state of Minnesota. The tangible property of the defendant, both real and personal, situated in Minnesota, and other states was assessed during the years in question, and the defendant paid the taxes assessed. The defendant has during all of the time maintained its existence as a corporation organized under the laws of this state, and has kept and maintained continuously a public office in the city of Grand Forks in this state for the transaction of its usual and corporate business.

The trial court found and the plaintiff admits that the assessments involved in this litigation were made under Section 2110, Compiled Laws, 1913, which provides: "The president, secretary or principal accounting officer of any company or association, whether incorporated or unincorporated except banking corporations whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

1. The name and location of the company and association.
2. The amount of capital stock authorized and the number of shares into which said capital stock is divided.
3. The amount of capital stock paid up.
4. The market value, or if they have no market value, then the actual value of the shares of the stock.
5. The total amount of all indebtedness except the indebtedness of current expenses, excluding from such expenses the amount paid for purchase or improvement of property.
6. The value of all real property, if any.
7. The value of its personal property.

The aggregate amount of the fifth, sixth and seventh items shall be deducted from the total amount of the fourth, and the remainder, if any, shall be listed as "bonds and stocks," under subdivision 33 of section 2103. The real and personal property of each company or association shall be listed and assessed the same as other real and personal property. In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain." Section 2103, referred to in Section 2110, *supra*, relates to the valuation by the assessor of personal property listed for taxation, and enumerates 27 items or classes of property to be listed and valued.

Among the items enumerated are bonds and shares of capital stock of companies and associations.

200 The preceding section, — Section 2102, — provides that "every person required by this chapter to list property shall, when called upon by the assessor, make out and deliver to the assessor a statement verified by oath, of all the personal property in his possession or under his control, * * *; but no person shall be required to include in his statement any share or portion of the capital

stock or property of any company or corporation which such company or corporation is required to list or return as its capital or property for taxation in this state."

It is undisputed that the defendant has not paid any tax whatever on its corporate stock, or at all, in this state during the years in question. And there is no contention that the elements of value or taxable property enumerated as taxable under Section 2110, supra, have been assessed in any other state. Neither is there any contention that the defendant made any showing upon the trial, that the assessments made against it in this state for the years in question in any manner exceeded the amounts which should have been assessed against it under the rule prescribed by Section 2110, supra. The defendant, however, asserts that inasmuch as all of its tangible property is located beyond the borders of North Dakota, the intangible property owned by it is not subject to taxation in North Dakota; and that the defendant cannot be subjected to taxation under Section 2110, supra, without violating the rights guaranteed to it by Section 9, Article 1, of the Federal Constitution, and Section 1 of the 14th Amendment, and Sections 13 and 16 of the North Dakota Constitution.

In our opinion defendant's contentions cannot be sustained. The provisions of our state constitution recognize all property as taxable, except that specifically exempted. (Const. N. D. Sections 74-176). The legislature is directed to exempt certain classes of property from taxation, but until it has acted such property is subject to taxation for this provision in the constitution is not self-executing. (Engstad vs. Grand Forks County, 10 N. D. 54). Section 2110 was adopted as a part of Chapter 126, Laws 1897. The avowed purpose of that statute was to provide for a general system of taxation. It provided that "all property subject to taxation shall be listed and assessed every year, at its value." (Section 2093, Compiled Laws, 1913). It also provided that "the capital stock and franchises * * * of corporations * * * shall be listed in the county, town or district where the principal office or place of business of such corporation * * * is located in this state." (Section 2095, Compiled Laws, 1913). The specific purpose of Section 2110 was to prescribe the rule to be applied in the taxation of such companies or corporations domiciled in this state, as were not provided for by other provisions of law. The essential features of the section under consideration were adopted from Minnesota. In considering its purpose and effect the Supreme Court of Minnesota, speaking through Judge Mitchell, said: "Without stopping to discuss at length the whole scheme of taxation provided in our tax laws, an analysis and comparison of its various provisions satisfy us that the legislature intended section 1530 Gen. St. 1894, to be the exclusive method of listing and taxing the property of all corporations and companies falling within the purview of that section. That section nowhere provides for the listing and taxation of corporate franchises as such, as a separate and distinct item of personal property. The method there provided for is the very common and most equitable and efficient one,—of reaching the franchises and other

intangible property for purposes of taxation through the capital stock. The "Capital Stock" (using the term in the sense in which it is evidently used in this section) is as has been said, "a business photograph of all the corporate possessions and possibilities," and represents its business opportunities and capacities as well as its tangible assets. They enter into, and go to make up, the value of the stock. It is well settled that these franchises, although neither visible nor tangible are property which may be taxed the same as any other property. Hence a very common method of taxing corporations and stock companies is to list and assess all their tangible property, real and personal, the same as the like property of other persons is listed and assessed, and also, list and assess the capital stock at its actual or market value, less the value of its tangible real and personal property otherwise specifically listed and assessed. This system reaches every element of property value owned by the corporation, and at the same time avoids double taxation." (State vs. Duluth Gas & Water Co. N. W. 78, 1032-1033).

That such intangible property may be subjected to a property tax has been held by the highest court in the land. In the Adams Express Company case (166 U. S. 185, 219-225; 41 L. Ed. 965, 977-979), the United States Supreme Court, speaking through, Mr. Justice Brewer, said:—In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from taxing at its real value such intangible property. * * * To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. * * *

To say that there can be no such intangible property, that it is something of value, is to insult the common intelligence of every man. * * * Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for the purposes of taxation. * * * Substance of right demands that whatever be the real value of any property, that value may be accepted by the state for the purpose of taxation, and this ought not to be evaded by any mere confusion of words. * * * The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale."

While a tax assessed under Section 2110, supra, is in form a property tax, it is intended to reach, among other things the primary corporate franchise granted to it by the state, and as to that it is in substance or effect, to some degree at least, a tax upon the privilege of being a corporation. We do not however deem it necessary to enter into any discussion with regard to the name by which the tax is or ought to be designated. The question is one as to power of the legislature to provide for the imposition of the tax under the conditions prescribed, rather than the method selected. For "if the

purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction." (Kansas City etc. Co. vs. Botkin, 240 U. S. 226, 233, 60 L. Ed. 617, 619.)

Section 2110 was part of the laws of this state at the time the defendant corporation was organized, and its charter issued. The section has remained a part of our laws since its adoption. The defendant applied for and received its charter with knowledge of its provisions. It knew that a general corporation organized under the laws of this state was subjected to a tax upon its tangibles,—including the privilege granted to it by the state of being a corporation,—as prescribed by said section. "Undoubtedly," said Mr. Justice Hughes, speaking for the United States Supreme Court, (Hawley vs. Malden, 232 U. S. 112, 58 L. Ed. 477, 482), "the state in which a corporation is organized may provide, in creating it, for the taxation in that state of all its shares whether owned by residents or nonresidents. Corry vs. Baltimore, 196 U. S. 466, 49 L. Ed. 556, 25 Sup. Ct. Rep. 297. This is by virtue of the authority of the creating state to determine the basis of organization and the liabilities of shareholders. Id., pp. 476, 477; Hamis Distilling Co. v. Baltimore, 216 U. S. 285, 293, 294, 54 L. ed. 482, 485, 486, 30 Sup. Ct. Rep. 326. So, by reason of its dominant power to provide for the organization and conduct of national banks, Congress has fixed the places at which alone shares in those institutions may be taxed." See, also Rogers & Hennepin 240 U. S. 184-60 L. Ed. 594, 37 Cyc. 961.

Defendant places great reliance upon the decision of the United States Supreme Court in Delaware etc. Ry. Co. vs. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, and contends that under the rule announced therein the taxation of defendant under the provisions of Section 2110, supra, constitutes a taking of its property without due process of law. The situation presented in the case cited was radically different from that presented in the case at bar. In the case cited there was included in the valuation of the property sought to be assessed in Pennsylvania the value of tangible property located permanently outside of that state. So the effect of the assessment was to compel the railroad company to pay taxes in Pennsylvania upon tangible property located beyond the borders of that state. But that condition cannot possibly occur under Section 2110, supra. That section specifically provides that the value of all real and personal property of the corporation shall be deducted from the value of the capital stock. Hence, the very situation which the court held to be fatal to the tax in the Delaware case is guarded against by the express provisions of the statute under consideration.

204 In this connection it should be noticed that the Supreme Court of the United States has expressly said that the Delaware Railroad Company case is not applicable to a tax on intangible personal property, or even to a tax on tangible personal property, which has not acquired an actual situs. In speaking of the Delaware Railroad case and certain other decisions cited by the defendant in this case, in Hawley vs. Malden, 232 U. S. 1, 11, 58 L. Ed. 477,

482, the Court said: "But these decisions did not involve the question of the taxation of intangible personal property; nor do they apply to tangible personal property which, although physically outside the state of the owner's domicile, has not acquired an actual situs elsewhere. *Southern P. Co. vs. Kentucky* 222 U. S. 63, 68, 56 L. Ed. 96, 98. When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation." In the *Southern Pacific* case, the Court said: "To say that the protection which the corporation receives from the state of its origin and domicile affords no basis for imposing taxes upon tangibles which have not acquired an actual situs under some other jurisdiction is not supportable upon grounds of either abstract justice or concrete law." (222 U. S. 76, 56 L. Ed. 101.)

It should be remembered that we are not dealing with a corporation organized to carry on a business of itself interstate commerce, and whose property, while situated in several states, in reality forms but one unit. (But even as to this class of corporations the United States Supreme Court has held that where one of such corporations voluntarily invokes the laws of a state and receives a grant of corporate existence, it cannot subsequently complain of the mode in which a tax, imposed upon it in accordance with the laws in force

at the time it applied for and received its franchise is measured. *Kansas City etc. Ry. Co. v. Stiles*, 242 U. S. 111, 61 L. Ed. 176). But in the case at bar, we are dealing with

a corporation organized for a purpose not of itself interstate commerce. We are dealing with an artificial being which was created, and now exists and exercises its powers, by virtue of the laws of this state, and which by the very law of its creation became a citizen of this state (222 U. S. 76), and from the inherent law of its nature cannot emigrate and become a citizen elsewhere. (222 U. S. 71.) The nature and purpose of defendant's business is discussed in *Great Atlantic & Pacific Co. vs. Cream of Wheat Co.*, 224 Fed. 566. From what is there stated it is evident that the value of defendant's corporate stock depends largely upon its intangible property. It is a matter of common knowledge that the corporate stock in the defendant company is quite valuable. As already stated there is no contention that the assessments made, in fact, exceed the amounts which would have been properly assessable against it during the years in question under the rule provided by Section 2110, *supra*. The defendant company appeared and filed protests against the assessments before the Boards of Equalization of the City of Grand Forks, and of the County of Grand Forks, but in neither of such protests did it attempt to show that the assessments were excessive under Section 2110. The defendant has taken the position throughout that it is not liable to taxation in this state, and that it is beyond the power of our taxing officials to make any assessment against it under said section, or at all.

The defendant, also, makes the point that the evidence shows that it had no bonds and stocks, and hence that an assessment for such

property cannot be sustained. It is true the defendant had no stocks or bonds of other companies. But the legislature merely provided that the value of defendant's corporate stock as determined under Section 2110, should be inserted under this item in the assessment list. This is purely an administrative matter, and within the sphere of legislative control. (See, *Rogers vs. Hennepin*, 240 U. S. 184, 190, 60 L. Ed. 594, 598.)

206 We are of the opinion that the defendant was subject to taxation in this state, and that the assessment of taxes against it under the rule prescribed by Section 2110 did not amount to a taking of its property without due process or deny to it the equal protection of the laws, neither did it infringe any other constitutional rights guaranteed to it by the constitutional provisions which it has invoked. If there is any constitutional objection to the rules prescribed by Section 2110, *supra*, it is that it operates as a discrimination in defendant's favor. (See, *State vs. Duluth Gas & Water Co.*, *supra*.)

As already stated the trial court resolved all questions relating to the alleged defects and irregularities in the assessments in plaintiff's favor. The trial court so stated in a memorandum decision which it filed in the case. In its findings, however, the court found that the assessments for the years 1908 to 1913, both inclusive, were directly made by the Tax Commission. This finding we believe to be erroneous. While the evidence shows that the Tax Commission advised that the assessment be made it also shows that the assessments were in fact made and entered and reviewed by the officers whose duty it was to do so. It has not been shown that the assessments are in any manner fraudulent, or excessive.

It follows from what has been said that the judgment appealed from must be reversed, and judgment entered in favor of the plaintiff for the taxes involved herein. It is so ordered.

A. M. CHRISTIANSON.

K. E. LEIGHTON, *Dist. J.*

A. A. BRUCE.

GRACE, J.:

I concur in the result.

RICHARD H. GRACE.

Mr. Justice Birdzell, being disqualified, did not participate, Hon. K. E. Leighton, Judge of Eighth Judicial District, sitting in his stead.

207

COUNTY OF GRAND FORKS

VS.

CREAM OF WHEAT CO.

ROBINSON, J. (dissenting):

This is an action by the County of Grand Forks to recover from the defendant about \$30,000, back taxes for the years 1906 to 1914, inclusive, on property that escaped taxation in those years.

The complaint avers that in 1914, under the direction of the T Commissioners, the County Auditor of Grand Forks County duly assessed certain personal property situated in the City and County Grand Forks, to-wit: bonds and stocks, for said years, as property ing escaped taxation; that all of such personal property was then a there and had during each of said years been the property of t defendant and had not been assessed or taxed during any of s years. That such assessment was duly equalized by the boards equalization and duly entered and extended on the tax list of s County against the personal property of the defendant. That d ing the year 1914 the city assessor of Grand Forks duly assessed that year certain personal property of the defendant, in the City Grand Forks, to-wit:—stocks and bonds, and the same was d equalized and taxes extended against the same to the amount \$3,180; and that the County Commissioners duly passed a resolut to bring suit for the collection of such taxes.

The answer amounts to a general denial and it avers that in s several years the defendant had no property in the City or Coun of Grand Forks, and that during said years it did not own stocks bonds of any kind.

On all points of law and fact the trial court found against the pla tiff, and it appeals to this Court.

The lengthy brief of counsel for plaintiff is swollen with need citations and quotations from the courts of other states, and w points quite immaterial. For instance, it is contended that the in question is not really a property tax, as alleged in the complain

but that it is a franchise tax, or a tax on the very existence 208 the corporation, because it is a corporation of this State;—a numerous authorities are cited to show that states may le such a franchise tax. To all that the answer is that the compla does not count on a corporate franchise tax, and such a tax is u known to the laws of this state. To secure its corporate existen in accordance with the laws of the state, defendant paid to the St the requisite fee of \$50, and now it is contended that the st may tax its existence to the amount of three or four thousand dol a year. But the State is not in that kind of business. The pla tiff brings this action to recover a judgment for the alleged taxes seven years on personal property that escaped taxation. Of cou in such action, the plaintiff has the burden of proof. The plain must show the existence of property within the taxing jurisdic an assessment of the property in the manner prescribed by law, a l of the several taxes in pursuance of law. (Cons. Sec. 175.) Pr erty must be assessed in the County, City, Township, Town, V lage or District in which it is situated, in the manner prescribed law. (Cons. Sec. 179.) The tax must be levied in pursuance of on all property according to its value in money. (Cons. Sec. 1 176.) The plaintiff has shown no compliance with these consti tional prerequisites to a valid tax, and it has been shown beyond c pute that in said several years the defendant did not have property the amount of \$50.00, or even \$1, within the taxing jurisdic and that it was not the owner of any stocks or bonds, either

Grand Forks County or elsewhere. The assessment is simply against "stocks and bonds," without any description of the same. If this refers to stocks or bonds of any party other than the defendant, the testimony shows that plaintiff never purchased or owned any such securities. If it refers to stocks and bonds issued and sold in the name of the defendant company, that is a liability and not an asset. A company does not own the thing it sells. It may own blank forms of stock certificates, with authority to sell the same, but until a sale is actually made, the blank forms have no more force or effect than blank promissory notes. In a case of this kind, where a suit
209 is brought to recover a judgment for taxes, the plaintiff must aver and prove facts sufficient to constitute a cause of action. In this case there is no such proof. There was no assessment; no property to assess; and there is no evidence showing the levy of any taxes. There is no occasion for a long story on or a speculative discussion of things which may have been. That which does not appear to exist is to be regarded as if it did not exist. (Sec. 7264.)

J. E. ROBINSON.

210 [Endorsed:] File No. 3499. Grand Forks County, Plaintiff and —, vs. Cream of Wheat Co., Defendant and —. Opinion of Court by Christianson, J. Filed in court this 30 day of November, 1918. J. H. Newton, Clerk. Re-hearing denied — —, 191—.

211-212 File No. 3499.

STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff and Appellant,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant and
Respondent.

Appeal from the District Court of Grand Forks County.

This action coming on to be heard at the June A. D. 1918 term of this court at the Supreme Court room, in the City of Bismarek, State of North Dakota;

Present: Andrew A. Bruce, Chief Justice; A. M. Christianson, Richard H. Grace, James E. Robinson, Associate Justices, and K. E. Leighton, District Judge, and the appeal herein having been argued by Geo. E. Wallace for the Appellant and by Rome G. Brown for Respondent and the court having advised thereon, it is now here considered, ordered and adjudged that the judgment of the said District Court within and for said Grand Forks County appealed from herein, be and the same is hereby reversed and judgment is directed to be entered in favor of the plaintiff for the taxes involved herein.

And it is further ordered, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this court.

And it is further considered and adjudged, That Appellant have and recover of the Respondent costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated November 30th, 1918.

By the Court:

A. A. BRUCE,
Chief Justice.

Attest:

[Seal Supreme Court of North Dakota.]

J. H. NEWTON, *Clerk.*

(See reverse side.)

213 Endorsed as follows: File No. 3499. In the Supreme Court, State of North Dakota. County of Grand Forks, Plaintiff and —, vs. Cream of Wheat Company, Defendant and —. Order for Judgment. Filed in Court this 30th day of November, 1918. J. H. Newton, Clerk. Remittitur sent down — —, 191—.

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of North Dakota.]

J. H. NEWTON, *Clerk.*

214 STATE OF NORTH DAKOTA:

Supreme Court, June Term, A. D. 1918.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff and Appellant,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant and
Respondent.

Pursuant to an order of Court made and entered in this cause on the 30th day of November, A. D. 1918.

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the First Judicial District, sitting within and for the County of Grand Forks, be and the same hereby is reversed, and that said case be and the same hereby is remanded to the Court below

with directions to enter judgment herein in favor of plaintiff and against defendant, for the taxes involved herein.

Dated and signed this 26th day of December, A. D. 1918.

By the Court:

Attest:

J. H. NEWTON, *Clerk.*

STATE OF NORTH DAKOTA,
Supreme Court, ss:

I, J. H. Newton, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capital, in the City of Bismarck, this 26th day of December, A. D. 1918.

[Seal of the Supreme Court, State of North Dakota.]

J. H. NEWTON, *Clerk.*

215 [Endorsed:] No. 3499. County Grand Forks v. Cream of Wheat Co. Judgment. Filed in Supreme Court, State N. D., Dec. 26, 1918. J. H. Newton, Clerk. Entered Book E. Minute Judgment Book, at p. 270.

216 STATE OF NORTH DAKOTA:

Supreme Court.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Plaintiff and Appellant,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant and
Respondent.

Petition by Respondent, Cream of Wheat Company, for Allowance of Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of North Dakota.

To the Honorable A. M. Christianson, Chief Justice of the Supreme Court of the State of North Dakota:

The petition of the Cream of Wheat Company, respondent in the above entitled proceedings, respectfully shows that on the 26 day of December, 1918, a final judgment was entered in said Supreme Court, the same being the highest court of said state in which a de-

eision could be had, and the same being a tribunal having jurisdiction under the laws of the State of North Dakota, to render final judgment in all proceedings of such nature and said judgment being a final judgment in said proceedings, wherein this petitioner was defendant and respondent, and said County of Grand Forks, was plaintiff and appellant.

And your petitioner further shows that in and by said proceedings and record the following facts appear, and in connection with the same the following claims were and are made by said petitioner.

1. It is shown by the pleadings and evidence that these proceedings are an attempt by County of Grand Forks, Defendant in Error, to recover from Cream of Wheat Company, Plaintiff in Error, certain taxes, which were attempted to be assessed, levied and imposed under a certain taxing statute of the State of North Dakota, 217 to wit, Section 2110 of the Compiled Laws of North Dakota for 1913, and said judgment of the Supreme Court of North Dakota herein complained of declares valid and enforces said taxing statute of the State of North Dakota, and declares valid and enforceable, by the proceedings in this action, assessments for taxes and levy thereof for taxes against said Cream of Wheat Company, plaintiff in error herein, under assessments made as and for the years 1908 to 1914, inclusive, under said statute of the state of North Dakota, and enforces and renders judgment against said Cream of Wheat Company, Plaintiff in Error herein, for said taxes in the following amounts: for the year 1908, \$3094; for the year 1909, \$3045; for the year 1910, \$2795; for the year 1911, \$3,980; for the year 1912, \$3094; for the year 1913, \$3155; for the year 1914, \$3180,—total \$22,343 and with interest and penalties.

Said taxing statute of the State of North Dakota and said assessment and levy and collection of taxes thereunder as construed and enforced by said decision and judgment, are an assessment and taxation as of property of said Cream of Wheat Company, Plaintiff in Error herein, no part of which property is situated in or taxable in or by the State of North Dakota or any municipal division thereof, and neither said property so attempted to be assessed and taxed, nor any part of it, has any situs or taxability within or by the State of North Dakota, nor in or by the County of Grand Forks, Defendant in Error herein, either under said statute nor in the proceedings herein or otherwise. The undisputed facts in this case, as found by the trial court and as affirmed by this judgment and decision, are that at no time during any of the years for which said taxes herein were assessed or levied, did Cream of Wheat Company own or have, and at no time since those years has Cream of Wheat Company 218 owned or had any property within the State of North Dakota, and, that at no time during any of the years for which said taxes herein were assessed and levied, did Cream of Wheat Company conduct, and at no time since those years, has Cream of Wheat Company conducted any business of any kind in the State of North Dakota, and that during all of said times, all of the business of the Cream of Wheat Company was conducted and all of its property was permanently located beyond the borders of North Dakota. Therefore, said taxing statute of the State of North Dakota as construed

and enforced herein, has the effect to assess and tax said Cream of Wheat Company, Plaintiff in Error herein, as and for property located wholly and taxable only, beyond the borders of the State of North Dakota.

Any judgment or decree against defendant in this case would have the effect in substance to declare valid and enforce the statute of North Dakota, under which these proceedings are brought and the effect of such enforcement would be to deprive this defendant of its property without due process of law.

2. By reason of the foregoing any judgment or decree herein against the defendant in these proceedings and said statute of North Dakota and the enforcement thereof, would be and are repugnant to the Constitution of the United States, and particularly to the provision of Section 1 of Article XIV of the Amendments to the Constitution of the United States, providing that no State shall deprive any person of property without due process of law.

And your petitioner further avers that the final judgment and decision of the Supreme Court of North Dakota was and is against the said claims of this petitioner, and against each of said claims; all of which claims and decisions more fully appear by the records and files now remaining in said Supreme Court and also by the assignments of error herewith presented and filed with this petition.

219 Wherefore, forasmuch as your petitioner believes that there were manifest errors in the said decision of said court against the said several claims of this petitioner, as hereinbefore set forth, and in the final judgment in said proceedings, which is to the great damage of this petitioner, this petitioner prays that Your Honor examine the records of said Supreme Court of North Dakota in that behalf and allow this petitioner a Writ of Error, to the end that said judgment and record may be brought before the Supreme Court of the United States, agreeable to the laws of the United States in that behalf enacted.

Dated December 27, 1918.

CREAM OF WHEAT COMPANY,

Petitioner,

By ROME G. BROWN,
ARNOLD L. GUESMER,
HARRY S. CARSON,

Its Attorneys.

Upon reading the above petition, upon said petition and upon the records submitted therewith, I hereby allow the Writ of Error prayed for therein, and said Writ of Error shall operate as a supersedeas upon the giving of bond for \$30,000, conditioned as the law requires.

Dated December 27, 1918.

A. M. CHRISTIANSON,
*Chief Justice of the Supreme Court
of the State of North Dakota.*

North Dakota, a Municipal Corporation, Plaintiff and Appellant, vs. Cream of Wheat Company, a corporation, Defendant and Respondent. Petition for writ of error. Filed in the office of the Clerk of the Supreme Court, State of North Dakota, Dec. 27, 1918. Rome G. Brown, Arnold L. Guesmer, Harry S. Carson, Attorneys for Petitioner, 1000 Metropolitan Life Bldg., Minneapolis, Minnesota.

221

Supreme Court of the United States.

CREAM OF WHEAT COMPANY, a Corporation, Plaintiff in Error,

vs.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
Municipal Corporation, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of North Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of North Dakota, before you or some of you, being the highest court of law or equity, in the said State, in which a decision could be had, in the said suit between the County of Grand Forks, in the State of North Dakota, a Municipal Corporation, Plaintiff and appellant, and Cream of Wheat Company, a corporation, defendant and respondent, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such validity, a manifest error hath happened to the great damage of said Cream of Wheat Company, as by its complaint appears, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, together with this Writ, so that you have the same at the said place, before the Justices aforesaid, within sixty days from the date

222

hereof, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States, ought to be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 27th day of December, in the year of our Lord, one thousand nine hundred and eighteen.

[Seal United States District Court, District of North Dakota.]

J. A. MONTGOMERY,
*Clerk of the District Court of the United States
 for the District of North Dakota,*
 By R. D. HOSKINS, *Deputy.*

The above writ is allowed, and the same shall operate as a supersedeas upon the giving of a bond for \$30,000, conditioned as the law requires.

A. M. CHRISTIANSON,
Chief Justice of the Supreme Court of North Dakota.

223 [Endorsed:] Original. Supreme Court of the United States. Cream of Wheat Company, a corporation, Plaintiff in error, vs. County of Grand Forks, in the State of North Dakota, a Municipal corporation, Defendant in Error. 3499. Writ of Error. Filed in the office of the clerk of the Supreme Court, State of North Dakota, Dec. 27, 1918. Rome G. Brown, Arnold L. Guesmer, Harry S. Carson, Attorneys for Plaintiff in Error, 1000 Metropolitan Life Bldg., Minneapolis, Minnesota.

224 Supreme Court of the United States.

CREAM OF WHEAT COMPANY, a Corporation, Plaintiff in Error,

vs.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA, a
 Municipal Corporation, Defendant in Error.

Citation.

United States of America to the County of Grand Forks, in the State of North Dakota, a Municipal Corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in the District of Columbia, within sixty days after the date hereof, pursuant to Writ of Error filed in the office of the Clerk of the Supreme Court of the State of North Dakota, wherein Cream of Wheat Company, a corporation, is plaintiff in error and County of Grand Forks, in the State of North Dakota, a Municipal Corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said Writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness, the Honorable A. M. Christianson, Chief Justice of the Supreme Court of North Dakota, this 27 day of December, 1918.

A. M. CHRISTIANSON,
*Chief Justice of the Supreme Court of the
 State of North Dakota.*

Personal service of the foregoing and receipt of copy are hereby admitted at Bismarek, North Dakota, this 27 day of December, 1918.

GEO. E. WALLACE,
 THEO. B. ELTON,
 O. B. BURTNESSE,
Attorneys for Defendant in Error.

225 [Endorsed:] Original. Supreme Court of the United States. Cream of Wheat Company, a corporation, Plaintiff in Error, vs. County of Grand Forks, in the State of North Dakota, a Municipal Corporation, Defendant in Error. Citation. 3499. Filed in the office of the clerk of the Supreme Court, State of North Dakota, Dec. 27, 1918. Rome G. Brown, Arnold L. Guesmer, Harry S. Carson, Attorneys for Plaintiff in Error, 1000 Metropolitan Life Bldg. Minneapolis, Minnesota.

226 STATE OF NORTH DAKOTA:

Supreme Court.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA,
 Municipal Corporation, Plaintiff and Appellant,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant and Respondent.

Assignments of Error by Respondent, Cream of Wheat Company, Plaintiff in Error, Presented and Filed With the Petition for Writ of Error from the United States Supreme Court to the Supreme Court of the State of North Dakota.

The said Petitioner, Plaintiff in Error, for writ of error from the Supreme Court of the United States to the Supreme Court of the State of North Dakota in the above entitled proceedings, by Rome G. Brown, Arnold L. Guesmer and Harry S. Carson, its attorneys, the same time with the presenting and filing of its petition for writ of error in the above entitled proceedings, states that in the record of the proceedings, decision and final judgment of the Supreme Court of the State of North Dakota, in the above entitled matter, there are manifest errors, in this:

1. That the said decision and judgment, in substance and in fact, hold valid and enforce a certain taxing statute of the State of North Dakota, to wit Section 2110 of the Compiled Laws of North Dakota.

for 1913, and as construed and enforced in this case against said Cream of Wheat Company, plaintiff in Error herein, as more particularly shown by the record, said statute is repugnant to the Constitution of the United States in the following particulars:

(1) That the same deprives Plaintiff in Error of its property without due process of law and is contrary to Section 1, Article XIV of the Amendments to the Constitution of the United States.

227 2. And, further, in this, that the judgment herein complained of declares valid and enforces said taxing statute of the State of North Dakota, and declares valid and enforceable, by the proceedings in this action, certain assessments for taxes and levy thereon for taxes against said Cream of Wheat Company, Plaintiff in Error herein, under assessments made as and for the years 1908 to 1914, inclusive, under said statute of the State of North Dakota, and enforces and renders judgment against said Cream of Wheat Company, Plaintiff in Error herein, for said taxes in the following amounts: for the year 1908, \$3,094; for the year 1909, \$3,045; for the year 1910, \$2,795; for the year 1911, \$3,980; for the year 1912, \$3,094; for the year 1913, \$3,155; for the year 1914, \$3,180,—total \$22,343, and with interest and penalties; that said taxing statute of the State of North Dakota and the said assessment and levy and collection of taxes thereunder as construed and enforced by said decision and judgment, are an assessment and taxation as of property of said Cream of Wheat Company, Plaintiff in Error herein, no part of which property is situated in or taxable in or by the State of North Dakota, or any Municipal division thereof, and neither said property so attempted to be assessed and taxed, nor any part of it, has any situs or taxability within or by the State of North Dakota, nor in or by the County of Grand Forks, defendant in error herein, either under said statute nor in the proceedings herein or otherwise; that the undisputed facts, in this case, as found by the trial court and as affirmed by this judgment and decision, are that, at no time during any of the years for which said taxes herein were assessed or levied, did Cream of Wheat Company own or have, and at no time since those years has Cream of Wheat Company owned or had any property within the State of North Dakota, and that at no time during any of the years for which said taxes herein were assessed and levied, did Cream of Wheat Company conduct, and at no time since those years, has Cream of Wheat Company conducted any business of any kind in the State of North Dakota, and that during all of said times all the business of the Cream of Wheat Company was conducted and all of its property was permanently located beyond the borders of North Dakota; and that, therefore, said taxing statute of the State of North Dakota, as construed and enforced herein, has the effect to assess and tax said Cream of Wheat Company, Plaintiff in error herein, as and for property located wholly, and taxable only, beyond the borders of the State of North Dakota.

228 Wherefore, the said Plaintiff in Error prays that the said judgment of the Supreme Court of the State of North Dakota be reversed and annulled, and that said Plaintiff in Error may be restored to all

things that it has lost by reason of said judgment and that judgment be rendered in favor of said Plaintiff in Error and against Defendant in Error herein.

Dated December 27th, 1918.

ROME G. BROWN,
ARNOLD L. GUESMER,
HARRY S. CARSON,
*Attorneys for Plaintiff in Error,
Cream of Wheat Company.*

229 Endorsed as follows: Original. State of North Dakota, Supreme Court. County of Grand Forks in the State of North Dakota, a Municipal Corporation, Plaintiff and Appellant, vs. Cream of Wheat Company, a corporation, Defendant and Respondent. Assignments of Error, Accompanying Petition for Writ of Error. Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Dec. 27, 1918. Rome G. Brown, Arnold L. Guesmer, Harry S. Carson, Attorneys for Defendant and Respondent, 1000 Metropolitan Life Bldg., Minneapolis, Minnesota.

230 STATE OF NORTH DAKOTA:

Supreme Court.

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA,
Municipal Corporation, Plaintiff and Appellant,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant and Respondent.

Supersedeas Bond on Writ of Error.

Know all men by these presents, That we, Cream of Wheat Company, a corporation, as principal, and Massachusetts Bonding and Insurance Company, a corporation, organized and existing under the laws of the State of Massachusetts, as surety, are firmly bound unto County of Grand Forks, in the State of North Dakota, a Municipal Corporation, in the full and just sum of Thirty thousand dollars (\$30,000), to be paid to said County of Grand Forks, its successors, representatives or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of December, in the year of our Lord, One thousand nine hundred and eighteen.

Whereas, lately, in the Supreme Court of the State of North Dakota, in a suit pending in said court, between the County of Grand Forks, in the State of North Dakota, a Municipal Corporation, appellant, and Cream of Wheat Company, a corporation, respondent, judgment was rendered against said respondent, Cream of Wheat

company, and the said respondent having obtained a Writ of Error and filed a copy thereof in the office of the Clerk of said court to reverse the judgment in the aforesaid cause, and the citation directed to the said County of Grand Forks, citing and admonishing it to be and appear at the Supreme Court of the United States at Washington, in the District of Columbia, within sixty days from the date thereof:

Now, the condition of the above obligation is such that if the said Cream of Wheat Company shall prosecute said Writ of Error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

[Corporate Seal.]

CREAM OF WHEAT COMPANY,
By FREDERIC W. CLIFFORD, [SEAL.]
Its Treasurer, and
E. MAPES, [SEAL.]
Its Secretary.

[Corporate Seal.]

MASSACHUSETTS BONDING & INSURANCE COMPANY,
By W. H. MARSH AND [SEAL.]
C. P. SCHOUTEN, [SEAL.]
Its Attorneys in Fact.

Signed, sealed and delivered in the presence of

HARRY S. CARSON.
BERNICE J. GROSS.
M. J. STIXROOD.
J. D. HOFSTAD.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 27th day of December, 1918, before me a Notary Public, within and for said County, personally appeared Frederic W. Clifford and Emery Mapes, to me personally known, who, being each by me duly sworn, did say that they are respectively the Treasurer and Secretary of Cream of Wheat Company, the corporation named in the foregoing instrument and that the seal affixed to the said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; that said Frederic W. Clifford and Emery Mapes, acknowledged the same to be the free act and deed of said corporation.

[NOTARIAL SEAL.]

HARRY S. CARSON,
Notary Public, Hennepin County, Minnesota.

My commission expires August 20, 1919.

Acknowledgement of Surety.

STATE OF MINNESOTA,

County of Hennepin, ss:

On this 27th day of December, 1918, before me, a Notary Public within and for said County and State, personally appeared W. H. Marsh and C. P. Schouten, to me personally known who, being by me duly sworn, upon oath did say that they are the agents and attorneys in fact of and for the Massachusetts Bonding and Insurance Company, a body corporate, duly incorporated under the laws of the Commonwealth of Massachusetts, and having its principal office in Boston, Mass., that the corporate seal affixed to the foregoing and within instrument is the seal of the said company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said W. H. Marsh and C. P. Schouten did severally acknowledge that they executed the said instrument as the free act and deed of said company.

[NOTARIAL SEAL.]

MARION J. STIXROOD,

Notary Public, Hennepin County, Minnesota.

My Commission expires 7/8/1925.

The foregoing is hereby approved as a good and sufficient supersedeas bond.

A. M. CHRISTIANSON,

*Chief Justice of the Supreme Court
of the State of North Dakota.*

STATE OF NORTH DAKOTA:

In Supreme Court,

COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA,
Municipal Corporation, Plaintiff and Appellant,

vs.

CREAM OF WHEAT COMPANY, a Corporation, Defendant and Respondent.

It is hereby stipulated, by and between George E. Wallace, The B. Elton and O. B. Burtness, attorneys for the County of Grand Forks, in the State of North Dakota, a municipal corporation, plaintiff and appellant, and Rome G. Brown, Arnold L. Guesmer and Harry S. Carson, attorneys for the Cream of Wheat Company, defendant and respondent, that a stay of execution may be ordered upon the defendant and respondent furnishing a supersedeas bond in the sum of Thirty Thousand Dollars (\$30,000.00); that the bond furnished by the defendant and respondent in the sum of Thirty

thousand Dollars (\$30,000.00) given by the Massachusetts Bonding Insurance Company as surety, is a good and sufficient bond.
Dated at Bismarek, North Dakota, December 27, 1918.

GEO. E. WALLACE,
THEO. B. ELTON, AND
O. B. BURTNESS,

Attorneys for Plaintiff and Appellant.

ROME G. BROWN,
ARNOLD L. GUESMER, AND
HARRY S. CARSON,

Attorneys for Defendant and Respondent.

34 Endorsed as follows: Original. State of North Dakota.
Supreme Court. County of Grand Forks, in the State of
North Dakota, a Municipal Corporation, Plaintiff and Appellant, vs.
Cream of Wheat Company, a Corporation, Defendant and Respond-
ent. Bond on Writ of Error. Filed in the Office of the Clerk of
the Supreme Court, State of North Dakota, Dec. 27, 1918. Rome
G. Brown, Arnold L. Guesmer, Harry S. Carson, Attorneys for Pe-
titioner, 1000 Metropolitan Life Bldg., Minneapolis, Minnesota.

35 STATE OF NORTH DAKOTA:

Supreme Court.

*Return of Clerk of the Supreme Court of North Dakota on Writ of
Error.*

STATE OF NORTH DAKOTA, ss:

Office of Clerk of Supreme Court.

I, J. H. Newton, Clerk of the Supreme Court of the State of North
Dakota, do hereby, in obedience to the writ of error herein issued,
certify and return to the Supreme Court of the United States that the
foregoing and annexed transcript of record is a full and complete
transcript of the record, judgment, judgment roll and all of the pro-
ceedings had in the said Supreme Court of the State of North Dakota,
in the case between County of Grand Forks, in the State of North
Dakota, a municipal corporation, Appellant and Cream of Wheat
Company, a corporation, Respondent, including the opinion of the
said Supreme Court filed upon the hearing in which the judgment
herein was rendered and also a true and correct copy of an excerpt
from respondent's brief filed in said State Supreme Court upon the
hearing upon which the final judgment herein was rendered, which
excerpt shows that respondent re-asserted and urged in said State
Supreme Court all of the Federal questions which it had raised by
the record in the trial court.

And I do further certify and return that I have annexed to said
transcript and included therewith, and that the foregoing is a true
and correct copy of the original petition for writ of error, with allow-

ance of the same and also of the assignments of error presented and filed with said petition for writ of error, including petition for reversal, and also of bond on writ of error with approval of the same as the same remain on file and of record in said Supreme Court of the

236 State of North Dakota, and also the original writ of error from the Supreme Court of the United States, with allowance of the same, and the citation issued thereon, with proof of service thereon, and on each of the same endorsed, and that the foregoing constitutes a true, full and complete return on said writ of error.

In witness whereof, I have hereunto set my hand and the seal of the said Supreme Court of the State of North Dakota, at the capitol Bismarck, North Dakota, this 13 day of February, 1919.

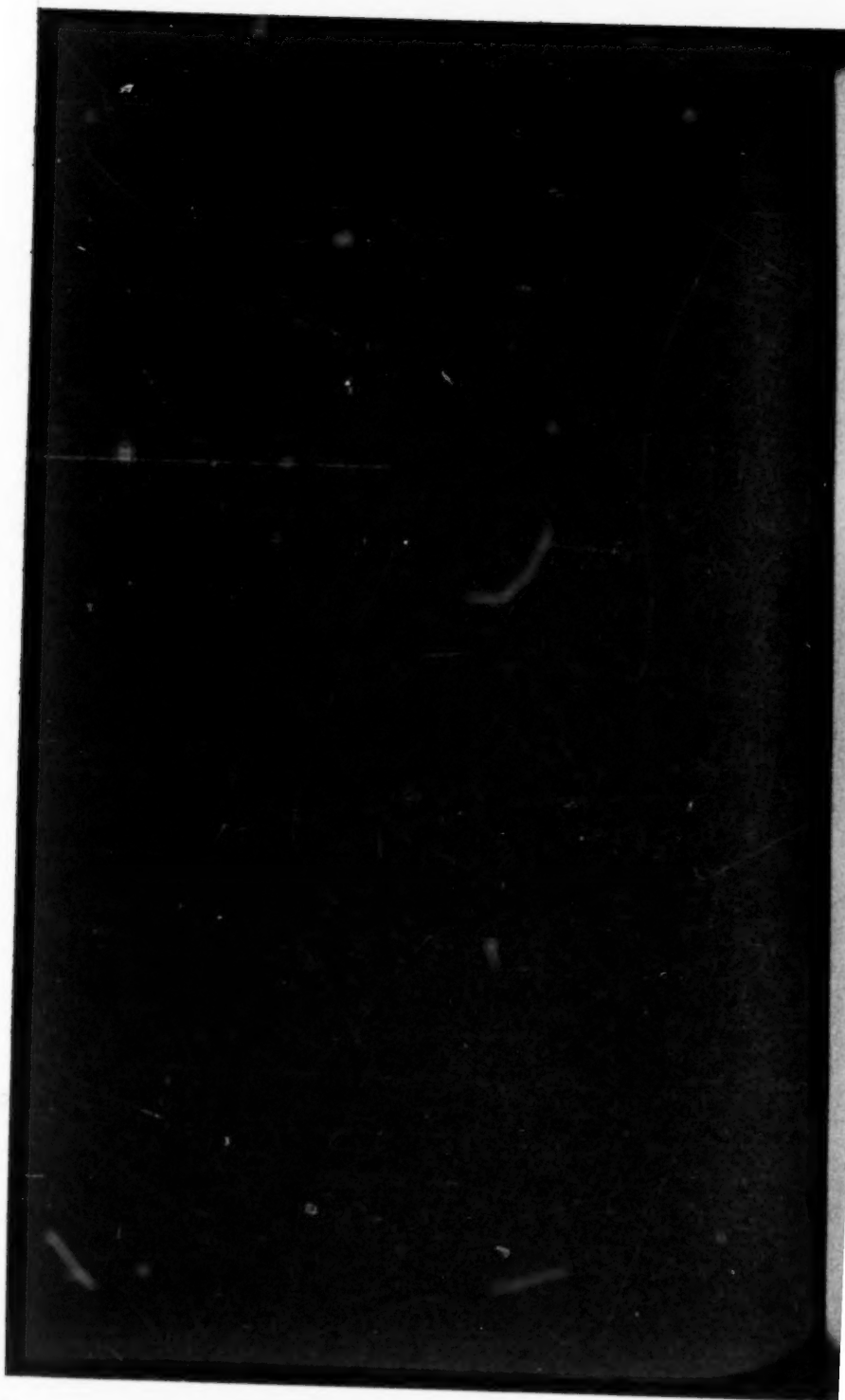
[Seal of the Supreme Court, State of North Dakota.]

J. H. NEWTON,

Clerk of the Supreme Court of N. D.


Endorsed on cover: File No. 26,950. North Dakota Supreme Court. Term No. 864. Cream of Wheat Company, plaintiff in error vs. The County of Grand Forks, in the State of North Dakota. Filed February 18th, 1919. File No. 26,950.





Supreme Court of the United States.

OCTOBER TERM, 1918

No.  302

CREAM OF WHEAT COMPANY,

Plaintiff in Error,

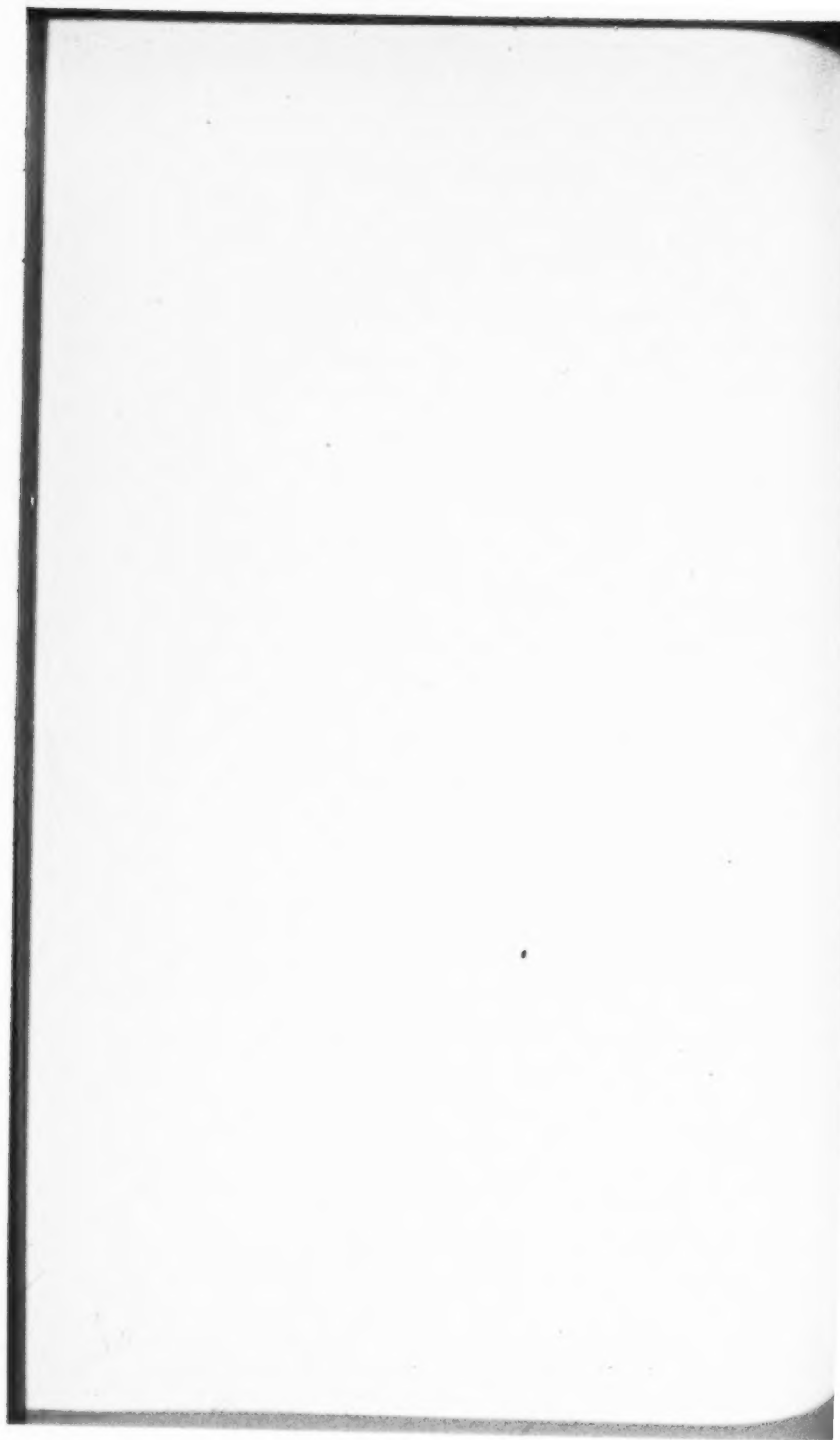
vs.

THE COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA,
Defendant in Error.

ON ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

ROME G. BROWN,
ARNOLD L. GUESMER,
HARRY S. CARSON,
EDWIN C. BROWN
Attorneys for Plaintiff in Error



SYNOPSIS AND INDEX.

	Page
STATEMENT OF CASE	1
DECISION IN THE STATE COURT	4
FEDERAL QUESTION RAISED IN STATE COURT	5
ASSIGNMENTS AND SPECIFICATIONS OF ERROR	5
STATEMENT OF FACTS	7

ARGUMENT.

I. THE TAX ATTEMPTED TO BE LEVIED BY SECTION 2110, COMPILED LAWS OF NORTH DAKOTA FOR 1913, IS A PROPERTY TAX AND NOT A FRANCHISE TAX	11
1. THIS TAX IS A PROPERTY TAX AS SHOWN BY THE TERMS OF THE STATUTE ITSELF	11
Section 2110, Compiled Laws of North Dakota for 1913	12
<i>Flint v. Stone Tracy Co.</i> , 220 U. S. 107	13
2. THIS TAX IS A PROPERTY TAX AS SHOWN BY A LATER ENACTMENT OF THE NORTH DAKOTA LEGISLATURE ..	14
Chapter 222 of the Session Laws of North Dakota for 1919	14
3. THIS TAX IS A PROPERTY TAX AS SHOWN BY THE AD- MISSIONS OF GRAND FORKS COUNTY IN THIS CASE ...	15
4. THIS TAX IS A PROPERTY TAX AS SHOWN BY THE RE- PORTS OF THE NORTH DAKOTA TAX COMMISSION	16
5. THIS TAX IS A PROPERTY TAX AS SHOWN BY JUDICIAL AUTHORITY CONSTRUING AN IDENTICAL STATUTE ...	18
<i>State v. Duluth Gas & Water Co.</i> , 76 Minn. 96....	19
6. THIS TAX IS A PROPERTY TAX AS SHOWN BY AUTHORI- TATIVE TEXT WRITERS	22
<i>Beale on Taxation of Corporations, both Foreign and Domestic</i> , Sec. 546	23
<i>Joyce on Franchises</i> , Sec. 424, page 752	23

<i>State v. Seaboard & Roanoke R. R. Co.</i> , 52 Fed.	
450	23
7. THIS TAX IS A PROPERTY TAX AS SHOWN BY THE DECISIONS OF THIS COURT AND OF NUMEROUS FEDERAL AND STATE COURTS	23
<i>Del. L. etc. R. R. v. Pennsylvania</i> , 198 U. S. 341	24
<i>Bank of Commerce v. New York City</i> , 2 Black 620	24
<i>The Banks v. The Mayor</i> , 7 Wall. (74 U. S.) 16 ..	24
<i>Bank Tax Case</i> , 2 Wall. (69 U. S.) 200	24
<i>Pullman's Car Company v. Pennsylvania</i> , 141 U. S. 18	24
<i>Fargo v. Hart</i> , 193 U. S. 490	24
<i>Home Savings Bank v. Des Moines</i> , 205 U. S. 503	24
<i>State v. Seaboard & Roanoke R. R. Co.</i> , 52 Fed.	
450	24
<i>Bank v. Treasurer of Lucas County</i> , 25 Fed. 749	24
<i>Commonwealth v. Standard Oil Co.</i> , 101 Pa. St. 119	24
<i>Merchants Ins. Co. v. Newark</i> , 54 N. J. L. 138	24
<i>Nichols v. New Haven & N. Co.</i> , 42 Conn. 103	24
<i>State v. Stonecall Ins. Co.</i> , 89 Ala. 335	24
CERTAIN CASES DISTINGUISHED	30
<i>Society for Savings v. Coite</i> , 6 Wall. 594	30
<i>Provident Institution v. Massachusetts</i> , 6 Wall. 611	30
<i>Kansas City, etc. R. R. Co. v. Stiles</i> , 242 U. S. 111	30
<i>Home Ins. Co. v. New York</i> , 134 U. S. 594.	30
<i>Kansas City, etc. Ry. Co. v. Kansas</i> , 240 U. S. 227	31
<i>Hamilton Mfg. Co. v. Massachusetts</i> , 6 Wall. 632	31
<i>Commonwealth v. Hamilton Mfg. Co.</i> , 12 Allen 298	31

II. ON THE FACTS IN THIS CASE THE SITUS OF THE CREAM OF WHEAT COMPANY'S INTANGIBLE PROPERTY IS ONLY WHERE ITS TANGIBLE PROPERTY IS LOCATED AND ITS BUSI- NESS CONDUCTED, NAMELY, BEYOND THE BORDERS OF NORTH DAKOTA; AND, ON THE FACTS IN THIS CASE, NORTH DAKOTA IS AS POWERLESS TO TAX INTANGIBLE PROPERTY, THE SITUS OF WHICH IS BEYOND ITS BORDERS, AS IT IS TO TAX TANGIBLE PROPERTY BEYOND ITS BORDERS	33
<i>Adams Express Co. v. Ohio</i> , 165 U. S. 194 and 166 U. S. 185	34
<i>Western Union Telegraph Co. v. Massachusetts</i> , 125 U. S. 530.....	34
<i>Massachusetts v. Western Union Telegraph Co.</i> , 141 U. S. 40	34
<i>Maine v. Grand Trunk Railway</i> , 142 U. S. 217	34
<i>Pittsburgh, Cincinnati, etc. Ry. Co. v. Backus</i> , 154 U. S. 421	34
<i>Cleveland, Cincinnati, etc. Ry. Co. v. Backus</i> , 154 U. S. 439	34
<i>Western Union Telegraph Co. v. Taggart</i> , 163 U. S. 1	34
<i>Pullman's Palace Car Co. v. Pennsylvania</i> , 141 U. S. 18	34
<i>Louisville, etc. Ferry Co. v. Kentucky</i> , 188 U. S. 385	34
<i>Commonwealth v. West India Oil Refining Co.</i> , 138 Ky. 828, 129 S. W. 301.	34
CERTAIN CASES DISTINGUISHED	43
<i>Hawley v. Malden</i> , 232 U. S. 1	44
<i>Powers v. Detroit & Grand Haven R. R.</i> , 201 U. S. 543	44
<i>Home Savings Bank v. Des Moines</i> , 205 U. S. 503	44

<i>Southern Pacific Co. v. Kentucky</i> , 222 U. S. 63 . . .	45
<i>Old Dominion Steamship Co. v. Virginia</i> , 198 U. S. 299	45
CONCLUSION	46

APPENDIX.

I. North Dakota Statutes:

(1) Section 2110, Compiled Laws of North Dakota for 1913	49
(2) Section 2103, Compiled Laws of North Dakota for 1913	49
(3) Section 7846, Compiled Laws of North Dakota for 1913	51
(4) Chapter 222 of the Session Laws of North Dakota for 1919	52

II. Decision of North Dakota Court.

(1) Decision of the trial court with its memorandum of authorities and its findings of fact, conclusions of law, and order for judgment	56
(2) Decision of North Dakota Supreme Court, including dissenting opinion of Justice Robinson	77

LIST of AUTHORITIES CITED.

<i>Adams Express Co. v. Ohio</i> , 165 U. S. 194 and 166 U. S. 185, 218-219, 223-225	34
<i>Bank v. Treasurer of Lucas County</i> , 25 Fed. 749	24
<i>Bank of Commerce v. New York City</i> , 2 Black 620, 629 ..	24, 28
<i>Beale on Taxation of Corporations, both Foreign and Do- mestic</i> , Sec. 546	23
<i>Cleveland, Cincinnati, etc. Ry. Co. v. Backus</i> , 154 U. S. 439	34
<i>Commonwealth v. Hamilton Mfg. Co.</i> , 12 Allen 298	31
<i>Commonwealth v. Standard Oil Co.</i> , 101 Pa. St. 119, 145	24
<i>Commonwealth v. West India Oil Refining Co.</i> , 138 Ky. 828, 129 S. W. 301	34, 37
<i>Del. L. etc. R. R. v. Pennsylvania</i> , 198 U. S. 341, 352-361 ...	24
<i>Fargo v. Hart</i> , 193 U. S. 490	24
<i>Flint v. Stone Tracy Co.</i> , 220 U. S. 107, 145	13
<i>Hamilton Mfg. Co. v. Massachusetts</i> , 6 Wall. 632, 639-641 ..	31
<i>Hawley v. Malden</i> , 232 U. S. 1, 9-10, 11	44
<i>Home Ins. Co. v. New York</i> , 134 U. S. 594	30
<i>Home Savings Bank v. Des Moines</i> , 205 U. S. 503, 516- 517	24, 45
<i>Joyce on Franchises</i> , Sec. 424, page 752	23
<i>Kansas City, etc. Ry. Co. v. Kansas</i> , 240 U. S. 227	30
<i>Kansas City, etc. R. R. Co. v. Stiles</i> , 242 U. S. 111	30
<i>Louisville, etc. Ferry Co. v. Kentucky</i> , 188 U. S. 385, 395- 398	34, 41
<i>Maine v. Grand Trunk Railway</i> , 142 U. S. 217	34
<i>Massachusetts v. Western Union Telegraph Co.</i> , 141 U. S. 40	34
<i>Merchants Ins. Co. v. Newark</i> , 54 N. J. L. 138	24
<i>Nichols v. New Haven & N. Co.</i> , 42 Conn. 103	24
<i>Old Dominion Steamship Co. v. Virginia</i> , 198 U. S. 299 ...	45

<i>Pittsburgh, Cincinnati, etc. Ry. Co. v. Backus</i> , 154 U. S.	
421	34
<i>Powers v. Detroit & Grand Haven R. R.</i> , 201 U. S. 543, 559-	
560	44
<i>Provident Institution v. Massachusetts</i> , 6 Wall. 611, 627, 631	30
<i>Pullman's Palace Car Co. v. Pennsylvania</i> , 141 U. S. 18	24, 34
<i>Society for Savings v. Coite</i> , 6 Wall. 594	30
<i>Southern Pacific Co. v. Kentucky</i> , 222 U. S. 63	45
<i>State v. Duluth Gas & Water Co.</i> , 76 Minn. 96, 103-106	19
<i>State v. Seaboard & Roanoke R. R. Co.</i> , 52 Fed. 450	23, 24
<i>State v. Stonewall Ins. Co.</i> , 89 Ala. 335	24
<i>The Bank Tax Case</i> , 2 Wall. (69 U. S.) 200, 209	24, 29
<i>The Banks v. The Mayor</i> , 7 Wall. (74 U. S.) 16	24, 29
<i>Western Union Telegraph Co. v. Massachusetts</i> , 125 U. S.	
530	34
<i>Western Union Telegraph Co. v. Taggart</i> , 163 U. S. 1	34

Supreme Court of the United States.

OCTOBER TERM, 1918

No. 864.

CREAM OF WHEAT COMPANY,

Plaintiff in Error,

vs.

THE COUNTY OF GRAND FORKS, IN THE STATE OF NORTH DAKOTA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This case comes here upon a writ of error to the Supreme Court of the State of North Dakota after final judgment in the State Court adjudging that the defendant in error was entitled to recover from plaintiff in error certain taxes which were attempted to be assessed and imposed on plaintiff in error under a statute of North Dakota providing for a tax upon the *value* of capital stock of corporations. All of the Company's property of every kind and nature is permanently located beyond the borders of North Dakota and all of its business of every

kind and nature is transacted beyond the borders of North Dakota, and it is the claim of plaintiff in error that the statute in question, as so construed, enforced, applied and upheld, operates on the facts in this case, to take the property of plaintiff in error without due process of law in violation of Section 1, of Article XIV of the Amendments to the Constitution of the United States.

In the "Appendix" to this brief there is reproduced for convenience (I) the various statutes of North Dakota referred to in this brief and (II) the decision of the North Dakota Court, consisting of (1) the decision of the trial court, with its memorandum of authorities and its findings of fact, conclusions of law and order for judgment and (2) the decision of the Supreme Court of North Dakota, including the dissenting opinion of Justice Robinson.

The statute in question, which appears as Section 2110, Compiled Laws of North Dakota for 1913, and as Section 1503 of the Revised Code of North Dakota for 1905, is as follows:

"Sec. 2110. *Property of companies or associations, how and by whom listed.* The president, secretary, or principal accounting officer of any company or association, *whether incorporated or unincorporated*, except banking corporations whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

1. The name and location of the company and association.
2. The amount of capital stock authorized and the number of shares into which said capital stock is divided.
3. The amount of capital stock paid up.
4. The market value or if they have no market value, then the actual *value* of the shares of the stock.
5. The total amount of all indebtedness except the indebtedness for current expenses, excluding from such expenses the amount paid for purchase or improvement of property.
6. The value of all real property, if any.
7. The value of its personal property.

The aggregate amount of the fifth sixth and seventh items shall be deducted from the total amount of the fourth and the remainder, if any, shall be listed as 'bonds or stocks' under subdivision 23 of Section 2103. The real and personal property of each company or association shall be listed and assessed the same as other real and personal property. In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain."

Section 2110, Compiled Laws of North Dakota for 1913
(This is also set forth in full at page 49 of the appendix to this brief).

In 1914, the taxing officials attempted to make assessments against plaintiff in error under this statute in the amount of fifty thousand dollars (\$50,000) for each of the years 1908 to 1914, inclusive, the assessments for the back years 1908-1913, being attempted on the theory that the subject matter in question was *property* which had escaped taxation during the years named (See Plaintiff's Exhibit 1, which was page 18 of the auditor's book of property which had escaped taxation, and Plaintiff's Exhibits 2 and 3, which were pages 92 and 96, respectively, of the 1914 assessment book of the city assessor of Grand Forks. These exhibits are inserted in the Record between pages 102-103, thereof).

Thereafter taxes were attempted to be extended on each of the assessments so made, and the amount sought to be recovered by the complaint, exclusive of interest and penalties, was \$22,343, as follows (Record, pp. 7-8).

Taxes for the year 1908	\$3,094.
Taxes for the year 1909,	3,045.
Taxes for the year 1910	2,795.
Taxes for the year 1911,	3,980.
Taxes for the year 1912,	3,094.
Taxes for the year 1913,	3,155.

Taxes for the year 1914,

3,180.

Total amount sought to be recovered, exclusive
of interest and penalties,

\$22,343.

DECISION IN THE STATE COURT.

The trial court decided that the statute in question imposed a property tax and not a franchise tax, and that, inasmuch as all of the company's property was permanently located beyond the borders of North Dakota, and inasmuch as all of its business was transacted beyond the borders of North Dakota, the statute in question, if enforced in the present case, would operate to tax property beyond the territorial limits of North Dakota (See decision of trial court, which is set forth in full at pages 57 to 77 of the appendix to this brief) and judgment was entered in the trial court adjudging that each and all of the assessments and taxes in question were null and void (Record, pp. 46-47).

From the judgment so entered by the trial court, the county appealed to the Supreme Court of North Dakota, which court by its decision (which is set forth in full at pages 77 to 87 of the appendix to this brief), reversed the decision and judgment of the trial court. Thereafter final judgment was entered in the Supreme Court of North Dakota, adjudging that each and all of the taxes and assessments in question were valid and that defendant in error was entitled to recover from plaintiff in error the full amount of the taxes together with all interest and penalties thereon (Record, p. 122), and it is to review the final judgment so entered that the writ of error was allowed and prosecuted (Record, pp. 123-128).

FEDERAL QUESTION RAISED IN STATE COURT.

The Federal question, that the statute as so enforced and applied, takes the property of the plaintiff in error without due process of law, was duly raised by plaintiff in error in the State courts. It was originally raised by the answer (pars. X and XVI thereof, Record, pp. 11-12, and p. 15). It was again raised by motion for dismissal made at the close of plaintiff's testimony (Record, pp. 83-84). It was again raised by motion for dismissal made at the close of all the testimony (Record, p. 100). It was the basis of much of the argument before the trial court and is the foundation of its decision (See decision of trial court, which is set forth in full at pages 57 to 77 of the appendix to this brief). When defendant in error appealed the case to the Supreme Court of North Dakota, this Federal question was specifically reserved by plaintiff in error in the brief which it filed in that court (Record, p. 111), and the opinion and judgment of the Supreme Court of North Dakota necessarily involved and passed upon this Federal question (See opinion of North Dakota Supreme Court, which is set forth in full at pages 77 to 87 of the appendix to this brief).

ASSIGNMENTS AND SPECIFICATIONS OF ERROR.

Plaintiff in error alleges and states that in the record, proceedings, decision and final judgment of the Supreme Court of North Dakota, in the above entitled matter, there are manifest errors, in this:

1. That the said decision and judgment, in substance and in fact, hold valid and enforce a certain taxing statute of the State of North Dakota, to-wit, Section 2110 of the Compiled Laws of

North Dakota for 1913, and as construed and enforced in this case against said Cream of Wheat Company, plaintiff in error herein, as more particularly shown by the record, said statute is repugnant to the Constitution of the United States in the following particulars:

(1) That the same deprives plaintiff in error of its property without due process of law and is contrary to Section 1, Article XIV of the Amendments to the Constitution of the United States.

2. And further, in this, that the judgment herein complained of declares valid and enforces said taxing statute of the State of North Dakota, and declares valid and enforceable, by the proceedings in this action, certain assessments for taxes and levy thereon for taxes against said Cream of Wheat Company, plaintiff in error herein, under assessments made as and for the years 1908 to 1914, inclusive, under said statute of the State of North Dakota and enforces and renders judgment against said Cream of Wheat Company, plaintiff in error herein, for said taxes in the following amounts: for the year 1908, \$3,094; for the year 1909, \$3,045; for the year 1910, \$2,795; for the year 1911, \$3,980; for the year 1912, \$3,094; for the year 1913, \$3,155; for the year 1914, \$3,180—total \$22,343, and with interest and penalties; that said taxing statute of the State of North Dakota and the said assessment and levy and collection of taxes thereunder as construed and enforced by said decision and judgment, are an assessment and taxation as of property of said Cream of Wheat Company, plaintiff in error herein, no part of which property is situated in or taxable in or by the State of North Dakota, or any municipal division thereof, and neither said property so attempted to be assessed and taxed, nor any part of it, has any situs or taxability within or by the State of North Dakota, nor in or by the County of Grand Forks, defendant in error herein, either under said statute nor in the

proceedings herein or otherwise; that the undisputed facts in this case, as found by the trial court and as affirmed by this judgment and decision, are that, at no time during any of the years for which said taxes herein were assessed or levied, did Cream of Wheat Company own or have, and at no time since those years has Cream of Wheat owned or had any property within the State of North Dakota, and that at no time during any of the years for which said taxes herein were assessed and levied, did Cream of Wheat Company conduct, and at no time since those years, has Cream of Wheat Company conducted any business of any kind in the State of North Dakota, and that during all of said times all the business of the Cream of Wheat Company was conducted and all of its property was permanently located beyond the borders of North Dakota; and that, therefore, said taxing statute of the State of North Dakota, as construed and enforced herein, has the effect to assess and tax said Cream of Wheat Company, plaintiff in error herein, as and for property located wholly, and taxable only, beyond the borders of the State of North Dakota.

Wherefore, the said plaintiff in error prays that the said judgment of the Supreme Court of the State of North Dakota be reversed and annulled, and that said plaintiff in error may be restored to all things that it has lost by reason of said judgment and that judgment be rendered in favor of said plaintiff in error and against defendant in error herein.

STATEMENT OF FACTS.

All of the facts (as found by the State Court) bearing upon the Federal question so presented are undisputed.

We shall here briefly summarize these undisputed facts.

Plaintiff in error was organized as a corporation under the laws of North Dakota (See finding of fact II in trial court, which finding appears at p. 72 of the appendix to this

brief), but prior to 1908, it duly complied with the laws of Minnesota relating to foreign corporations and obtained a license to transact business in the State of Minnesota (See finding of fact XIII in trial court, which finding appears at p. 74 of the appendix to this brief).

The business of the corporation during all of the years 1908 to 1914, inclusive was, and at all times since those years has been, the manufacture and sale of a breakfast food known as "Cream of Wheat," which is sold extensively throughout the United States and various foreign countries (See finding of fact XIII in trial court, which finding appears at p. 74 of the appendix to this brief).

Prior to 1908, plaintiff in error established and has since continuously maintained and operated a factory for the manufacture of, and a sales office for the sale of said product known as "Cream of Wheat," at Minneapolis, Hennepin county, Minnesota. At all times during the years 1908 to 1914, inclusive, plaintiff in error maintained no factory or sales office other than this factory and sales office at Minneapolis. At all times during said years all orders for the product of the corporation, namely, Cream of Wheat, were received by and filled through the said Minneapolis factory and sales office and for convenience and economy in distribution plaintiff in error, to fill orders, stored considerable quantities of said product in various cities of the United States. During all of said years all books of account were kept at the Minneapolis office of the corporation, and all remittances and payments of money were made to and received by plaintiff in error at its Minneapolis office (See finding of fact XIII in trial court, which finding appears at p. 74 of the appendix to this brief).

At no time during the years 1908 to 1914, inclusive, did plaintiff in error own or have, and at no time since those years has it owned or had, any real estate or any property of any kind within the State of North Dakota, or any money on deposit

therein. During the years 1908 to 1914, inclusive, the corporation maintained an office at the First National Bank of Grand Forks, but at no time during any of said years did it transact, and at no time since said years has it transacted, any business of any kind at said office at the First National Bank of Grand Forks, or at any other place in North Dakota, except that its corporate meetings were held at said office at the First National Bank of Grand Forks. For the office so maintained by plaintiff in error at the First National Bank of Grand Forks, it used, during all of the times in question, merely a portion of the ordinary banking quarters of said bank; and all fixtures and property of every kind in and about said office at the First National Bank of Grand Forks were during all of the times in question owned by the bank, and during all of the times in question plaintiff in error used said portion of said banking quarters as such office merely as a favor from the bank (See finding of fact XIV in trial court, which finding appears at p. 74 of the appendix to this brief).

During all of the times mentioned in the complaint and during all of the years 1908 to 1914, inclusive, plaintiff in error had and owned extensive real estate holdings in the State of Minnesota and a large amount of personal property which was permanently located at said factory in Minneapolis and at other places beyond the borders of the State of North Dakota, and all of the business of the corporation of every kind and nature excepting the mere holding of corporate meetings, was transacted beyond the borders of North Dakota (See finding of fact XV in trial court, which finding appears at p. 75 of the appendix to this brief).

Plaintiff in error was assessed and paid taxes for all of the years 1908 to 1914, inclusive, upon all of its real estate and personal property in the State of Minnesota and other states where its said property was located and its said business carried

on (See finding of fact XVI in trial court, which finding appears at p. 75 of the appendix to this brief. For a summary of the taxes so paid, including tax on moneys and credits see Defendant's Exhibit B, Record, pp. 108-110).

(The above mentioned findings of fact so far as the facts just stated are concerned were not specified by defendant in error for review in the State Supreme Court and therefore must be deemed to have been properly decided by the trial court by reason of Section 7846 of the Compiled Laws of North Dakota for 1913 which Section 7846 is set forth at p. 51 of the Appendix to this brief. As establishing the facts so summarized, see also testimony of witness Brown, Record, pp. 86-92).

It is also undisputed that at no time during any of the years in question did plaintiff in error own any stock or bonds of any other companies or corporations (See testimony of witness Brown, Record, p. 88).

The foregoing are the essential facts bearing upon the Federal question presented and, as stated above, these facts are undisputed.

We maintain two propositions:

I. THE TAX ATTEMPTED TO BE LEVIED BY SECTION 2110, COMPILED LAWS OF NORTH DAKOTA FOR 1913, IS A PROPERTY TAX AND NOT A FRANCHISE TAX.

II. ON THE FACTS IN THIS CASE THE SITUS OF THE CREAM OF WHEAT COMPANY'S INTANGIBLE PROPERTY IS ONLY WHERE ITS TANGIBLE PROPERTY IS LOCATED AND ITS BUSINESS CONDUCTED, NAMELY, BEYOND THE BORDERS OF NORTH DAKOTA; AND ON THE FACTS IN THIS CASE, NORTH DAKOTA IS AS POWERLESS TO TAX INTANGIBLE PROPERTY, THE SITUS OF WHICH IS BEYOND ITS BORDERS, AS IT IS TO TAX TANGIBLE PROPERTY BEYOND ITS BORDERS.

POINTS AND AUTHORITIES.

I.

The tax attempted to be levied by Sec. 2110, Compiled laws of North Dakota for 1913, is a property tax and not a franchise tax.

1. **THIS TAX IS A PROPERTY TAX AS SHOWN BY THE TERMS OF THE STATUTE ITSELF.**

At the trial the following admissions were made of record:

"Mr. Brown: (Speaking of the attempted assessments for the years 1908 to 1913, inclusive). I want to be fair, but I want to be cautious. I don't want the statements that I made to be construed as an admission upon our part, that the method that was required for any assessment under 2110 (Compiled Laws of North Dakota for 1913), was properly followed. I am simply admitting now that the amounts that were put down on there under Section 2110, were simply put there as being the amounts purporting to show—to be the result of the assessment under 2110, but we deny that they are. In other words, it is either that or nothing.

Mr. Wallace: Sure" (Record, bottom of page 52 and top of page 53).

"Mr. Brown: (Speaking of the attempted assessment for the year 1914). It is admitted, is it, the same as the other was, that this is an attempted assessment under Section 2110 (Compiled Laws of North Dakota for 1913), assessing intangible value, Mr. Burtness?

Mr. Burtness: Yes" (Record, top of page 55).

"Q. There is no dispute about it (the statute under which the assessments were attempted to be made) Mr. Londergan, we are all talking about 2110? (Compiled Laws of North Dakota for 1913).

A. Well, it was under that Section.

Mr. Brown: It was Section 1503 under the code of 1905, and under the statutes of 1913, it was Section 2110, the same thing.

Mr. Burtness: It is so conceded" (Record, page 73).

The North Dakota Supreme Court in its opinion made the following statement:

"The trial court found and the plaintiff admits that the assessments involved in this litigation were made under Section 2110, Compiled Laws, 1913" (See page 79 of the the Appendix to this brief).

It is thus admitted by both parties that each and all of the assessments and taxes in question were attempted to be assessed and imposed solely under Section 2110, Compiled Laws of North Dakota for 1913.

For convenience we here repeat this statute, Section 2110 of the Compiled Laws of North Dakota for 1913:

"Sec. 2110. *Property of companies or associations, how and by whom listed.* The president, secretary, or principal accounting officer of any company or association, whether incorporated or unincorporated, except banking corporations whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

1. The name and location of the company and association.
2. The amount of capital stock authorized and the number of shares into which said capital stock is divided.
3. The amount of capital stock paid up.
4. The market value or if they have no market value, then the actual value of the shares of the stock.
5. The total amount of all indebtedness except the indebtedness for current expenses, excluding from such expenses the amount paid for purchase or improvement of property.
6. The value of all real property, if any.
7. The value of its personal property.

The aggregate amount of the fifth, sixth and seventh items shall be deducted from the total amount of the fourth and the remainder, if any, shall be listed as 'bonds or stocks' under subdivision 23 of Section 2103. The real and personal property of each company or association shall be listed and assessed the same as other real and personal property. In all cases of failure or refusal of any person, officer company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain."

Section 2110 Compiled Laws of North Dakota for 1913. (This is set forth in full at page 49 of the Appendix of this brief).

It is especially significant that this statute nowhere describes the tax imposed by it as a franchise tax, but on the contrary the statute expressly describes the tax as one laid on "*property of companies or associations.*" The terms "franchise" or "exercise" do not appear. It will also be noted that the net amount arrived at "shall be listed as 'bonds or stocks' under subdivision 23 of Section 2103," which Section 2103 is the Section of the North Dakota Law providing for the long general list for the assessment of personal property. (This Section 2103 of the Compiled Laws of North Dakota for 1913, is set forth in full at pp. 49 to 51 of the appendix of this brief). It ~~is~~^{is} apparent without the citation of authority that the *net amount* arrived at by making an assessment according to the terms of Section 2110 *includes every conceivable item of intangible property which the company possesses.* Such items of intangible property thus included in an assessment under the statute would be, among others, its good will, its trade marks, its patent rights, its rights to do business in other states, its contracts, and its accounts receivable.

Good will, patent rights, trade marks, moneys and credits, are as much property in this day and age as real estate or tangible personal property and there can be no question, looking at the plain meaning of the terms of this statute that its purpose is to levy a tax on every item of property that does not come within the exception of real property, tangible personal property and debts.

As said by Mr. Justice Day in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 145:

"While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so desig-

nated consistently with the meaning and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight." * * *

This statute, by its own terms, shows that it attempts to reach *every item of intangible property* which a company possesses.

Furthermore the statute, in fact and by its terms, is applicable to "any company or association, *whether incorporated or unincorporated*" (note opening paragraph of the statute). An unincorporated company or association does not have a franchise from the state, and the fact that this statute thus applies to *unincorporated* as well as incorporated companies and associations further shows conclusively that the statute in question imposes a property tax and not a franchise tax.

2. THIS TAX IS A PROPERTY TAX AS SHOWN BY A LATER ENACTMENT OF THE NORTH DAKOTA LEGISLATURE.

In 1919 the North Dakota Legislature enacted a law, Chapter 222 of the Session Laws of North Dakota for 1919, expressly providing for an excise or franchise tax on corporations.

The relevant language of this 1919 enactment is as follows:

"Every corporation * * * now or hereafter organized in the State for profit and having a capital stock represented by shares or issuing bonds shall pay annually a *special excise tax* with respect to the carrying on or doing business in the State by such corporation * * * during the previous calendar year, equivalent to 50 cents for each \$1,000.00 of the *fair value* of its capital stock or bonds issued; and in estimating the value of capital stock the surplus and undivided profits of such corporation, * * * shall be included. The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock and bonds for the preceding year; provided that for the purpose of this tax an exemption of \$10,000.00 shall be allowed from the capital stock of any such corporation."

Subsection (1) of Section 1 of Chapter 222 of Session Laws of North Dakota for 1919, which statute is set forth in full at pages 52 to 56 of the Appendix to this brief).

By this enactment North Dakota for the first time imposed an excise or franchise tax on corporations and as a matter of fact this 1919 law was enacted for the purpose of attempting to overcome the very objection which had been raised in the present case, namely, that the earlier law, Section 2110, Compiled laws of North Dakota for 1913, imposed a property tax. This subsequent legislative enactment in 1919 further shows conclusively that the statute in question, Section 2110, Compiled Laws of North Dakota for 1913, imposes a property tax and not a franchise tax.

3. THIS TAX IS A PROPERTY TAX AS SHOWN BY THE ADMISSIONS OF GRAND FORKS COUNTY IN THIS CASE.

The complaint in this action does not seek to recover the tax in question as a franchise or excise tax. On the contrary, the complaint expressly and emphatically alleges that the tax in question is a property tax, and the complaint seeks to recover solely and expressly on the ground that the tax in question is a property tax.

In paragraph 3 of the amended complaint (Record, pp. 6-7), the county alleges, concerning the assessments in question, that the county auditor duly assessed "certain personal *property* * * * as *property* having escaped taxation," and that the city assessor "likewise assessed the said personal *property* * * * as personal *property* having escaped taxation." and then, after the allegation as to equalization, the allegation is that the county auditor entered on the tax lists "against the personal *property* of the defendant so assessed" taxes for the years in question.

The complaint also sets forth (Record pp. 7-8) the resolution of the Board of County Commissioners of Grand Forks county, authorizing the action to be brought, which resolution is as follows:

"Whereas, personal *property* of the Cream of Wheat Company, a corporation, has been duly assessed, for the years 1908, 1909, 1910, 1911, 1912, 1913, 1914 * * * and whereas all of such personal *property* taxes are now delinquent. * * *

NOW, THEREFORE, be it resolved that an action be instituted * * * for the collection of all of the aforesaid delinquent personal *property* taxes."

It thus appears that counsel for the defendant in error and in this very case itself, have admitted that the tax in question is a property tax, and, further, that the complaint in the present case seeks to recover solely and expressly on the ground that the tax in question is a property tax.

4. THIS TAX IS A PROPERTY TAX AS SHOWN BY THE REPORTS OF THE NORTH DAKOTA TAX COMMISSION.

In 1912 the North Dakota Tax Commission made the following report and recommendations concerning Section 2110, Compiled Laws of North Dakota for 1913, which then appeared as Section 1503 of the Revised Codes of 1905:

"Conclusions:

With reference to the statute hereinbefore discussed our conclusions are as follows:

1. That the law is defective in the method prescribed for measuring corporate excess—in fact, it is economically unsound.

2. That it is legally unconstitutional. If the statute is to remain upon the statute books at all it should be amended by providing that the fourth and fifth items should be added together, and from the sum of the fourth and fifth items the sixth and seventh items should be deducted.

3. If the statute were repealed entirely no damage would result. In that the whole situation would be clear-

ed up from a legal standpoint and we would continue to assess as we do now, the real and personal property of ordinary corporations. Provision is elsewhere made for the assessment of the franchises of public utility corporations, the methods employed except insofar as qualified by the law under discussion, resting within the discretion of the officers whose duty it is to assess. We believe the wisest solution of the whole matter would be to repeal the law."

1912 *Report of Tax Commission*, p. 71.

Again, in the same report, the Tax Commission made the following recommendation:

"We recommend that Section 1503 of the Code of 1905, be so amended as to provide the following formula for the valuation of 'corporate excess,' market value or actual value of stock plus indebtedness, except for current expenses, minus the value of real and personal property, or preferably that the section be entirely repealed. See pages 67 to 71."

1912 *Report of Tax Commission*, p. 157.

In 1914 the report and recommendations of the Tax Commission were as follows:

"In its first report the Tax Commission called the attention of the legislature to Section 1503 Revised Code of 1905, which is the provision governing the assessment of the *property* of companies and associations. It was pointed out in that report that the section not only failed to accomplish the result that it was evidently designed to accomplish but that said section was unconstitutional as well. We shall not repeat the arguments that were used in our report two years ago in proof of these contentions, but we would respectfully call the attention of the legislature to the fact that a similar law which at one time prevailed in the State of Minnesota was there held to be unconstitutional (*State v. Duluth Gas & Water Company*, 78 N. W. 1032) and was subsequently amended. A similar law was also held unconstitutional in Nebraska (*State ex rel. Shriver, et al. v. Karr*, 90 N. W. 298). * * *

The fact that Section 1503, as it now stands, is a *dead letter*, becomes evident upon referring to the abstract of assessment of personal property in the Proceedings of the State Board of Equalization for any year. In the year

1913, for instance, under Item 21, headed 'Bonds and Stocks,' under which item the excess determined by applying Section 1503 is specifically directed to be placed, the assessment amounts to \$47,759, for the entire State. One county returning approximately one-half of this amount. It is perhaps a fair inference that in the county referred to the assessment of bonds and stocks represents items other than corporate excess, or perhaps is an aggregate of amounts arbitrarily placed there. It cannot be doubted that the time is now ripe to make a suitable amendment to Section 1503 if we are to make any progress in the matter of subjecting intangible *properties* to a reasonable and uniform tax.

.

In order that the section may state the correct rule, the first sentence of the last paragraph should be changed to read as follows:

"The aggregate amount of the sixth and seventh items shall be deducted from the total amount of the fourth and fifth items, and the remainder if any shall be listed as 'bonds or stocks' under subdivision 23 of Section 1496."

This will make the section workable and harmonious. It will then provide a rule of *valuation* that is now applied in a number of states, including Illinois, Rhode Island and California."

1914 *Report of Tax Commission*, pp. 102, 103.

These reports by the North Dakota Tax Commission further establish that the tax provided for by Section 2110, Compiled Laws of North Dakota for 1913, is a property tax and not a franchise tax.

5. THIS TAX IS A PROPERTY TAX AS SHOWN BY JUDICIAL AUTHORITY CONSTRUING AN IDENTICAL STATUTE.

This statute, Section 2110, Compiled Laws of North Dakota for 1913, was copied *verbatim* from Minnesota, the corresponding section in Minnesota being Section 1530 of the General Statutes of Minnesota for 1894 (Sec. 2015, General Statutes of Minnesota for 1913). North Dakota having taken this statute *verbatim* from Minnesota, it, of course, adopted with the statute the construction which the Minnesota Court bestowed upon it.

In *State v. Duluth Gas & Water Company*, 76 Minn. 96, it appeared that the Gas & Water Company had two franchises: (1) its franchise right to exist as a corporation under the laws of Minnesota, and (2) a local franchise entitling it to use the streets of Duluth for a public service business. Section 1524 of the General Statutes of Minnesota for 1894, provided the form of the long general list for the assessment of personal property and item 14 in that list was "the value and description of every franchise, annuity, royalty and patent right." The corresponding provision in North Dakota is in the same form and is found in Section 2103, subdivision 14, Compiled Laws of North Dakota for 1913, which Section 2103 of the Compiled Laws of North Dakota for 1913 is set forth in full at pages 49 to 51 of the appendix to this brief. (For form of this long general list, it being substantially the same in both Minnesota and North Dakota, see any one of the six slips, which are inserted immediately after page 102 of the Record, which six slips are a part of plaintiff's Exhibit 1 and appear in the Record immediately before it). The Minnesota taxing officials claimed that the two franchises of the Gas & Water Company could be assessed as franchises under subdivision 14 of Section 1524. The Supreme Court of Minnesota held that Section 1524, subdivision 14 and Section 1530 of the General Statutes of Minnesota for 1894, were required to be construed together; that Section 1524 subdivision 14 was required to be construed as applying only to franchises owned by private persons, and that the exclusive method of assessing corporations was under Section 1530; that this Section 1530, *nowhere provided for a franchise tax as such*; that under this Section 1530 the real estate and tangible personal property of corporations was assessed in the same way as like property of individuals and that the further tax provided for by Section 1530 reached "*every element of property value owned by the corporation.*" The Court held that inasmuch as this so-called "bonds or stocks," tax was a

property tax and not a franchise tax, the provision for the deduction of indebtedness was unconstitutional because in direct conflict with the constitutional requirement "that *all property* on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state." The Court further held that the unconstitutional provision as to the deduction of indebtedness could be eliminated and the rest of the statute permitted to stand.

The Court said:

"Without stopping to discuss at length the whole scheme of taxation provided in our tax laws, an analysis and comparison of its various provisions satisfy us that the legislature intended G. S. 1894, Sec. 1530, to be the exclusive method of listing and taxing the property of all corporations and companies falling within the purview of that section. *That section nowhere provides for the listing and taxation of corporate franchise as such, as a separate and distinct item of personal property.* The method there provided for is the very common and most equitable and efficient one,—of reaching the franchises and *other intangible property* for the purposes of taxation through the capital stock. The 'capital stock' (using the term in the sense in which it is evidently used in this section) is as has been said, 'a business photograph of all the corporate possessions and possibilities,' and represents its business opportunities and capacities as well as its *tangible assets*. They enter into, and go to make up the value of the stock. It is well settled that these franchises although neither visible nor tangible, are *property*, which may be taxed the same as any other property. Hence a very common method of taxing corporations and stock companies is to list and assess all their tangible property, real and personal, the same as the like property of other persons is listed and assessed, and also list and assess the capital stock at its actual or market value, less the value of its tangible real and personal property otherwise specifically listed and assessed. *This system reaches every element of property value owned by the corporation*, and at the same time avoids double taxation. This is clearly the scheme of taxation contemplated and provided for by Section 1530, with one exception which will be considered hereafter.

• • • • • •

"Sections 1524 and 1530 must be read and construed together; and, doing so, the fourteenth subdivision of the former section, providing for listing and assessing franchises as a specific and separate item of personal property was intended to apply only to franchises owned by private persons or others not falling within the provisions of Section 1530.

"Thus far there can be no constitutional objection to the system of taxation provided for in Section 1530, and no question but that the franchises of these corporations were not intended to be made subject to taxation as a separate item of personal property under Section 1524, but only taxable through the assessment of the capital stock, pursuant to the provisions of Section 1530. But in the latter section the legislature has gone a step further, and provided for the deduction from the value of the capital stock not merely of the value of the tangible corporate property otherwise specifically taxed, but also the total amount of all indebtedness of the association, except indebtedness for current expenses. Such a provision is in direct conflict with the constitutional requirement that all taxes shall be as nearly equal as may be, and that *all property* on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state. The indebtedness presumably affects the value of the stock as directly as do the assets of the corporation. The former depreciates, while the latter appreciates, its value. The practical effect of this provision is to allow a double deduction of the amount of the corporate indebtedness. It would necessarily result in inequality of taxation, not only as between the associations themselves falling within the provisions of section 1530 (owing to differences in their financial condition), but also as between all such associations and persons or associations taxed under the general provisions of the tax law who are not permitted to deduct their indebtedness from the value of franchises owned by them. See *Henderson v. Com.*, 99 Ky. 623, 31 S. W. 486." * * *

"The evident intention was to reach for taxation the franchises and *other intangible property* of these corporations and associations as effectually and completely as possible. This the legislature thought could best be accomplished by listing and assessing the value of the stock, which, as already suggested, represents *every element of property value, tangible and intangible*, owned by corporations or associations; but, in enumerating the deductions to be made they erroneously included their indebtedness, pre-

sumably because they failed to perceive that this had already entered into and gone to fix, the value of the stock, or that such a deduction would necessarily result in inequality of taxation. But with this deduction omitted what remains will effect the full and fair taxation of *all the intangible property* of these corporations and associations,—the very purpose which the legislature apparently had in mind."

State v. Duluth Gas & Water Co., 76 Minn. 96, 103-106.

It will be noted that the Minnesota Supreme Court held that the sections of the Minnesota statutes, which are identical with Section 2110 and Section 2103, subdivision 14, of the Compiled Laws of North Dakota for 1913, did not impose a tax on corporate franchises as such; that the exclusive method of assessing corporations is under Section 2110; that the capital stock tax provided for by Section 2110 reaches *every element of intangible property* possessed by the corporation; and further that the provision for the deduction of indebtedness was unconstitutional because in violation of the constitutional provision requiring *property* to be assessed equally and uniformly and at a cash valuation. *Such constitutional provisions relating to the taxation of property would, of course, not be applicable to a franchise tax and this decision is therefore a direct holding that Section 2110, Compiled Laws of North Dakota for 1913, imposes a property tax, and not a franchise tax.*

6. THIS TAX IS A PROPERTY TAX AS SHOWN BY AUTHORITATIVE TEXT WRITERS.

Professor Joseph H. Beale, an authority on the taxation of corporations, makes the following comments as to the North Dakota statutes relating to the taxation of corporations:

"546. North Dakota.

There is no franchise tax. The personal property of a corporation is assessed, and also its capital stock. The

statement made by the corporation to the assessor shows the amount of authorized and paid-up capital stock, the number and market value of the shares, the amount of indebtedness (excluding indebtedness for current expenses), and the value of its real and personal property. The sum of the value of its real and personal property and of its indebtedness is subtracted from the total value of its shares and *the remainder is taxed as stocks.*"

Beale on Taxation of Corporations, both Foreign and Domestic, Section 546. (Pub. 1904).

It will be noted that Professor Beale specifically states that there is no franchise tax on corporations in North Dakota.

Joseph A. Joyce, in his book on Franchises, states the test for determining whether a tax is a property tax or a franchise tax as follows:

"The test, whether the tax in any given case is a franchise as distinguished from a property tax, would seem, from the authorities, to be that a *tax according to a valuation is tax upon property*, whereas a tax imposed according to nominal value, or measured by some fixed standard of mere calculation,—as contrasted with valuation—fixed by the law itself, may be a franchise tax; thus, to illustrate, a *tax on capital stock cannot be a franchise tax as tested by the above criterion.*"

Joyce on Franchises, (1909), Sec. 424, page 752.

See *State v. Seaboard & Roanoke R. R. Co.*, 52 Fed. 450, 453.

There can be no question as to the soundness of the rule as stated by Joyce, and certainly no one would assert that the tax provided for by Section 2110, is on any basis other than that of valuation. Therefore, within the rule as stated by Joyce, the tax in question is a property tax and not a franchise tax.

7. THIS TAX IS A PROPERTY TAX AS SHOWN BY THE DECISIONS OF THIS COURT AND OF NUMEROUS FEDERAL AND STATE COURTS.

This Court has frequently held that a tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and that, in consequence, no tax can

thus be levied, which includes property which is otherwise exempt.

Del. L. etc. R. R. v. Pennsylvania, 198 U. S. 341.

Bank of Commerce v. New York City, 2 Black, 620.

The Banks v. The Mayor, 7 Wall. (74 U. S.) 16.

Bank Tax Case, 2 Wall. (69 U. S.) 200.

Pullman's Car Company v. Pennsylvania, 141 U. S. 18.

Fargo v. Hart 193 U. S. 490.

Home Savings Bank v. Des Moines, 205 U. S. 503.

The lower Federal courts and the state courts have repeatedly held the same as this court.

State v. Seaboard & Roanoke R. R. Co., 52 Fed. 450.

Bank v. Treasurer of Lucas County, 25 Fed. 749.

Commonwealth v. Standard Oil Co., 101 Pa. St. 119, 145.

Merchants Ins. Co. v. Newark, 54 N. J. L. 138.

Nichols v. New Haven & N. Co., 42 Conn. 103.

State v. Stonewall Ins. Co., 89 Ala. 335.

Del. L. etc. R. R. Co. v. Pa., 198 U. S. 341, involved a statute of Pennsylvania which provided that every corporation organized under the laws of Pennsylvania should pay an annual tax of 5 mills on each dollar of the *actual value of its whole capital stock*. For the purpose of determining the actual value of the stock each corporation was required to make an annual return setting forth among other things, complete information as to the amount of its capital stock, the par value thereof, the amount of capital paid in, the amount of dividends, the amount of gross and net earnings, the amount of surplus and profits, and also the average and the highest price of sales of stock during the year. The officers of the corporation making the return were required to appraise the stock at its actual value in cash and the assessing officers were authorized to re-appraise the actual value of the stock in case they were not satisfied as to the correctness of the appraisal made by the corporate offi-

cers, and upon the actual value of the stock as thus ascertained the annual tax of 5 mills on each dollar of actual valuation of the stock was imposed. The Delaware, Lackawanna & Western Railroad Company was a corporation organized under the laws of Pennsylvania; it operated extensive railroads and coal mines in Pennsylvania though its general office and treasury were located in the city of New York; in addition to its property in Pennsylvania the Company owned certain coal of the value of \$1,702,443 which had been mined in Pennsylvania, but which at the time of the appraisal of its stock had been transported to and was situated in other states awaiting sale.

The taxing officials of Pennsylvania claimed that the value of this coal thus situated outside of the State of Pennsylvania, should be taken into consideration in determining the actual value of the company's capital stock for the purpose of taxation under the act mentioned.

The state court so decided but this court reversed the judgment of the state court, and held that, inasmuch as the tax on the value of capital stock was a property tax and not a franchise tax and inasmuch as the State of Pennsylvania could not tax the coal itself thus beyond the borders of Pennsylvania, it could not attain the same end by taxing the enhanced value of the capital stock which arose from the property beyond the borders of Pennsylvania. Mr. Justice Peckham made the following statement:

"The coal itself when the appraisement of the value of the capital stock was made, was concededly beyond the jurisdiction of the State of Pennsylvania. It was taxable (and in fact was taxed) in the States where it rested for the purpose of sale, at the time when the appraisement in question was made. *Brown v. Houston*, 114 U. S. 622.
 * * * The coal had not been sold when the appraisement of the value of the capital stock was made, and at that time it was outside the jurisdiction of the State of Pennsylvania. A tax on that coal, *eo nomine*, or specifically, could not then be laid by that State, as counsel concede.

Now, was this tax, in substance and effect, laid upon the coal which was beyond the jurisdiction of Pennsylvania? The Supreme Court of Pennsylvania has held that a tax on the value of the capital stock is a tax on the property and assets of the corporation issuing such stock. *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119, 145; *For's Appeal*, 112 Pa. St. 337; *Commonwealth v. Delaware etc. R. R. Co.*, 165 Pa. St. 44. This court has also frequently held that a tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and in consequence no tax can thus be levied which includes property that is otherwise exempt *Bank of Commerce v. New York City*, 2 Black 620; *Bank Tax Case*, 2 Wall. 200; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 25; *Fargo v. Hart*, 193 U. S. 490, 498, 499.

• • • • •

"The position of the defendant in error is this: The tax in question is not a tax upon coal, treated as tangible property and a tangible asset specifically subject to tax. But is a tax upon the value of the capital stock of the Pennsylvania corporation at the fixed rate of five mills for each dollar of the actual value of the whole capital stock, including bonds, mortgages, moneys at interest, franchises, and property of other kinds, and that the statute in question does not impose a tax on the coal itself. Counsel do not contend that a tax on the value of the capital stock of a corporation is not a tax on its property in a certain sense, but they contend that while a tax on capital stock is a property tax, yet the property of the corporation for the purpose of taxation is reached through the tax imposed directly upon the stock (197 Pa. St. 553) and that there is a distinction between a tax on capital stock and a direct tax on personal property. Therefore tangible property situated outside the State, under the circumstances set forth in this case, is not directly taxed by a tax on the value of the capital stock, or at least there is no specific tax upon it and the tax is not illegal.

• • • • •

We regard this tax as in substance and fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the state which thus assumes to tax it.

So, if the State cannot tax tangible property permanently

outside the State and having no situs within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State.

.

We cannot see the distinction, so far as the question now before the court is concerned, between a tax assessed upon property, eo nomine, or specifically, when outside the State, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the State how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock or something else, which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock.

*Although the coal may have entered into the value of the capital stock when mined, the question is whether the value of the stock in November, 1899, when the appraisal was directed by the statute to be made, should not be decreased by deducting the value of the coal therefrom which was not in the State at the time of the appraisal. We think it should; otherwise the tax amounts in substance to a specific tax on the coal. * * **

It is true that in general an appraisal of, or an assessment of a tax upon, value is a decision upon a question of fact, and a difference of opinion as to the value between the assessing officer and the court is immaterial, and the decision of the former is final. But where the appraisal is arrived at by including therein tangible property, which is beyond the jurisdiction of the State, and which, therefore, the assessing officers had no jurisdiction to appraise (and none could be given them by the

statute), such an appraisement or assessment is absolutely illegal, as made without jurisdiction.

The next question is whether there is a right to relief in a case like this, founded upon the provisions of the Federal Constitution. We think there is. *The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment.*

.

The judgment of the Supreme Court of Pennsylvania is reversed and the cause remanded for further proceedings not inconsistent with the opinion of this court."

Delaware L. & etc. R. R. Co v. Pennsylvania, 198 U. S. 341, 352-361.

It will be noted that this court, in the case just cited, held that a tax on the value of the capital stock of the corporation is a property tax and not a franchise tax. On this proposition, this case is directly in point. Being a property tax statute, it would be such whether the property happening to be involved in a particular case is tangible or intangible.

In *Bank of Commerce v. New York City*, 2 Black, 620 it appeared that a State bank of New York had a considerable part of its capital invested in United States bonds. The legislature of New York enacted a law taxing all state banks upon the value of their capital stock. It was held that such a tax on capital stock according to its value was a property tax and that hence the law was unconstitutional as to that portion invested in Federal securities. Mr. Justice Nelson made the following statement:

"According to that system of taxation (a former law of New York, where the tax was laid upon the amount of nominal capital authorized in the charter) it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change

of this system, it is agreed the tax is upon the *property* constituting the capital."

Bank of Commerce v. New York City, 2 Black 620, 629.

In *The Banks v. The Mayor*, 7 Wall. (74 U. S.) 16, there was involved the same law as in the preceding case and a similar decision was made by this court.

The Bank Tax Case, 2 Wall. (69 U. S.) 200 involved the New York law, but in a modified form. The former act provided that the capital stock of the banks of the state should be "assessed at its actual value and taxed in the same manner as other personal and real estate of the county." After the decision in *Bank of Commerce v. New York City*, 2 Black, 620 the law was changed to read: "Shall be liable to taxation on a valuation equal to the amount of their capital stock." The counsel for the state argued that the tax was on the franchise and that reference to the capital stock was only to fix the amount required to be annually paid for the franchise. This court refused to sustain the contention so made and held that because the tax in question was according to the valuation of the stock, it was a property tax. Mr. Justice Nelson said:

"The Legislature well knew the peculiar system under which these institutions were incorporated and the working of it; and, when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested."

The Bank Tax Case, 2 Wall. (69 U. S.) 200, 209.

The decisions cited establish that a tax on capital stock according to its value is a tax upon property, whereas a tax imposed according to nominal amount or measured by some fixed standard of mere calculation,—as contrasted with valuation—is a franchise tax.

CERTAIN CASES DISTINGUISHED.

As emphasizing the distinction just pointed out, namely, that a tax on capital stock according to its value is a tax upon property, whereas a tax imposed according to nominal amount or measured by some fixed standard of mere calculation is a franchise tax, we call attention to the following cases, in each of which it appeared that the tax was not according to valuation but according to nominal amount or measured by some fixed standard of mere calculation, and in each of which this court held that the tax was a franchise or excise tax.

Society for Savings v. Coite, 6 Wall. 594, ($\frac{3}{4}$ of 1% on debts owed by the corporation in form of deposits.)

Provident Institution v. Massachusetts, 6 Wall. 611, ($\frac{1}{2}$ of 1% on deposits.)

Kansas City, etc. R. R. Co. v. Stiles, 242 U. S. 111, (so much per thousand to be paid annually on paid up capital, the rate varying with the amount authorized in the charter.)

Home Ins. Co. v. New York, 134 U. S. 594, ($\frac{1}{40}$ of 1% upon nominal amount of capital stock authorized and paid in, the rate varying with amount of dividends).

Kansas City, etc. Ry Co. v. Kansas, 240 U. S. 227, (Annual fee of \$10 to \$2,500 depending upon amount of paid-up capital.)

What was said by Mr. Justice Clifford in *Provident Institution v. Massachusetts*, 6 Wall. 611, *supra*, applies to this whole class of cases:

"Deposits, as the word is employed in that section, are the sums received by the institution from depositors without regard to the nature of the funds. They are not capital stock in any sense, nor are they even investments, as the word is there used, which simply means the sums received, wholly irrespective of the disposition made of the same or their market value." (p. 627).

"*Valuation of property* has nothing to do with determining the amount of the tax, but the amount depends on the average amount of the deposits for the six months preceding the respective days named, and it is quite obvious that there is no necessary relation between the average amount of the deposits and the amount of the property owned by the institution." (p. 631).

Such decisions, where the tax was not assessed according to valuation, can have no application to a case like the present one.

We also call attention to certain decisions which were cited by counsel for the defendant in error on the argument before the North Dakota Court as supporting their claim that the statute in question imposes a franchise tax and not a property tax.

Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632,
Commonwealth v. Hamilton Mfg. Co., 12 Allen 298,

These decisions are not authority establishing the proposition for which they are so cited. Massachusetts, unlike North Dakota, has a special constitutional provision giving power and authority to the legislature "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities." These decisions are based solely on (1) this special constitutional provision (2) a long-continued special interpretation of this constitutional provision by the courts of Massachusetts, and (3) a practice prevailing in Massachusetts long before these decisions were rendered. They are, therefore, not precedents in a state, like North Dakota, which does not have these special features.

This court stated in *Hamilton Company v. Massachusetts*, 6 Wall. 632, 639-641, that in the absence of such a special constitutional provision and the special considerations just mentioned, the decisions would be subject to criticism, and it applied them only because of these special features.

"Separated from the peculiar provision of the State constitution, and the long practice under the original decision, the present decision of the State court upon the subject might well be criticized as founded in unsubstantial distinctions, but when weighed as an exposition of that peculiar clause and in view of the long practice of the State, commencing long before the prior decision was made, it is not possible to withhold from the conclusion a full and unqualified concurrence. Most of the solid reasons for the rule are put forth in the early decision. Successors to the chief justice of that day, in treating the subject, though their opinions are able and well considered, have not been able to add much to the cogency and conclusive character of the reasons assigned by the court at that time in support of the well-founded distinction between franchise taxes and taxes on property, (Citing *Portland Bank v. Apthorp*, 12 Mass. 252).

Fifty years have elapsed since that decision was made, and the practice in substance and effect is still continued, having been repeatedly sanctioned by the unanimous decisions of the highest judicial authority of the State. Attempt is made to support the theory of the corporation defendants by the recent decisions of this court, but the effort is not successful, as was satisfactorily shown in the preceding case, to which reference is made.

Property taxation and excise taxation, as authorized in the constitution of the State, are perfectly distinct, and the two systems are easily distinguished from each other, if we adopt the definition of the term 'commodities' as uniformly given by the courts of the State, and as universally understood by the tax-payers and assessors. If regarded as meaning goods and wares only, there would be much difficulty in the case, but if it signifies 'convenience, privilege, profit, and gains,' as uniformly held by the State court, then all difficulty vanishes, and the case is clear. Such was the construction given to the term by the Supreme Court of the State more than fifty years before the present controversy arose, and the rule is well settled in this court that the construction of the constitution or statute of a State by the highest judicial tribunal of such State, in a case not involving any question under the twenty fifth section of the Judiciary Act, is to be regarded as a part of the provision, and that it is as binding upon the courts of the United States as the text."

Hamilton Company v. Mass., 6 Wall. 632, 639-641.

It is apparent that these Massachusetts decisions are based solely on the special constitutional provision just mentioned and on the special considerations just stated and that, as stated by this court, these decisions, in the absence of the special considerations just mentioned, would be subject to criticism as being founded in unsubstantial distinctions. These Massachusetts decisions are, therefore, not in any sense precedents in the present case.

The foregoing establishes that the tax attempted to be levied by Section 2110, Compiled laws of North Dakota 1913, is a property tax and not a franchise tax.

II.

On the facts in this case the situs of the Cream of Wheat Company's intangible property is only where its tangible property is located and its business conducted, namely, beyond the borders of North Dakota; and on the facts in this case, North Dakota is as powerless to tax intangible property, the situs of which is beyond its borders, as it is to tax tangible property beyond its borders.

It is undisputed (See statement of facts, pages 7 to 10 of this brief), that all of the company's property of every kind and nature is permanently located beyond the borders of North Dakota and that all of its business of every kind and nature is transacted beyond the borders of North Dakota and that it owns no property of any kind in North Dakota and that it transacts no business of any kind in North Dakota.

The law is that on the facts in this case the situs of the Cream of Wheat Company's intangible property is only where its tangible property is located and its business conducted, namely, beyond the borders of North Dakota; and on the facts in this case, North Dakota is as powerless to tax intangible property, the

situs of which is beyond its borders, as it is to tax tangible property beyond its borders.

Adams Express Co. v. Ohio, 165 U. S. 194 and 166 U. S. 185.

Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530.

Massachusetts v. Western Union Telegraph Co., 141 U. S. 40.

Maine v. Grand Trunk Railway, 142 U. S. 217.

Pittsburgh, Cincinnati etc. Ry. v. Backus, 154 U. S. 421.

Cleveland, Cincinnati, etc. Ry. Co. v. Backus, 154 U. S. 439.

Western Union Telegraph Co. v. Taggart, 163 U. S. 1.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18.

Louisville, etc. Ferry Co. v. Kentucky, 188 U. S. 385.

Commonwealth v. West India Oil Refining Co., 138 Ky. 828, 129 S. W. 301.

The cases just cited are of two classes, first, decisions which uphold the right of states, in which foreign corporations are doing business, to tax these foreign corporations not merely on the value of their tangible property within the state, but also on that proportion of their entire intangible property which is fairly represented by the property located and business transacted within the state, and second, decisions which deny the right of a state, in which a corporation is organized, to tax it on intangible property where all of its property is located and all of its business is transacted beyond the borders of the state.

Adams Express Co. v. Ohio, 165 U. S. 194, and 166 U. S. 185, is a typical case in the first class or group of cases. The Adams Express Company was a corporation with its principal office in New York. According to its showing, it had four million dollars worth of tangible property scattered through

different states, and with that tangible property thus scattered, it transacted business in many states, besides the state in which it was organized. The actual value of its capital stock was sixteen million dollars thus making the value of its intangible property twelve million dollars. This court held that the State of Ohio was not limited to merely taxing the tangible property of the Company within the borders of that State and that where the tangible property of a corporation is scattered through different states by means of which its business is transacted in each, the situs of its intangible property is not simply where its home office is, but it is distributed wherever its tangible property is located and its work is done; and that consequently the State of Ohio could tax the company on that proportion of its entire intangible property which was fairly represented by the tangible property located in and business transacted within the State of Ohio. This court, Mr. Justice Brewer speaking, said:

"The burden of the contention of the express companies is that they have within the limits of the State certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the State; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them. But this contention practically ignores the existence of intangible property or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing at its real value such intangible property. * * * It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts or obligations. It is enough that it is property which though intangible exists, which has value, produces income and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infre-

quently developed a property intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property?

But where is the situs of this intangible property? The Adams Express Company has, according to its showing in round numbers \$4,000,000 of tangible property scattered through different States and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises and privileges which it has acquired and possesses, it has created a corporate property of the actual value of \$16,000,000. Thus, according to its figures this intangible property, its franchises privileges, etc., is of the value of \$12,000,000, and its tangible property of only \$4,000,000. *Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work done? Clearly, as we think, the latter.* Every State within which it is transacting business and where it has its property, more or less, may rightfully say that the \$16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the State which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises and privileges into a single unit of property and this State contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the States other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those States, but unable to transact the express business within their limits, that \$12,000,000 of value attributable to its intangible property would shrivel to a mere trifle.

.

The Southern Pacific Railway Company is a corporation chartered by the State of Kentucky, yet within the limits of that State it is said to have no tangible property and no office for the transaction of business. The vast amount of tangible property which by lease or otherwise it holds and operates, and all the franchises to do which it exercises, exist and are exercised in the States and Territories on the Pacific Slope. Do not these intangible properties—these franchises to do—exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every state in which that tangible property is found?"

Adams Express Co. v. Ohio, 166 U. S. 185, 218-219, 223-225.

Commonwealth v. West India Oil Refining Co., 138 Ky. 828, 129 S. W. 301, is a typical case in the second class or group of cases, which hold that a state in which a corporation is organized is powerless to tax the corporation on intangible property, when all of its tangible property is located and all of its business is transacted beyond the borders of the State. The West India Oil Refining Company was a corporation organized under the laws of Kentucky. Its principal place of business was stated to be in Jefferson County, Kentucky, but it did not transact any business of any kind in Jefferson County or in the State of Kentucky, and it did not own any tangible property within the State of Kentucky. All of its refineries were located and operated in Cuba and Porto Rico and all of its property was located in Cuba and Porto Rico. It had certain sums of money on deposit in a bank in Cuba and also certain book accounts due to it for its product which had been sold and not paid for. The Commonwealth of Kentucky claimed that because the Company was organized under the laws of Kentucky it could be taxed there on its intangible property; on the other hand, the Company claimed that its intangible property followed the tangible property and that neither the cash nor the book accounts could be taxed by the Commonwealth of Ken-

tucky. The Kentucky Court of Appeals held that the situs of the intangible property of the corporation was where its tangible property was located and its business carried on, and that the corporation's intangible property had no situs in Kentucky and that neither the cash nor the book accounts could be taxed by the Commonwealth of Kentucky. The Court said:

"Section 172, of the Constitution provides that 'all property not exempted from taxation by this Constitution shall be assessed for taxation at its fair cash value.' Section 4020, Ky. Stat. (Russell's Stat. Sec. 5912), provides that all 'personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the same be in or out of the state, including intangible property,' shall be subject to taxation unless exempt. The appellee is a corporation organized under the laws of this state, its legal residence is in this state, and therefore, if the statute is constitutional, the property is taxable here. The validity of the statute was before the United States Supreme Court in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493. In that case a Kentucky corporation owned cars which had no situs in Kentucky. It was held by the Supreme Court that the Kentucky Statute was unconstitutional, and that the cars could not be taxed here, as they had no situs here. That case follows *Delaware L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077, 25 Sup. Ct. Rep. 669, where a similar ruling was made. In that case, in taxing the franchise of the railroad, the state of Pennsylvania refused to deduct the value of coal which the railroad company had mined in Pennsylvania and shipped to other states. It was held that to assess this coal and tax it when it had no situs within the state was a taking of property without due process of law.

In *Com. v. Dun*, 126 Ky. 108, 10 L. R. A. (N. S.) 920, 102 S. W. 859, it appeared that Dun & Company were non-residents of the state, but had established a business in the state and managed it by resident agents, having money in the bank, and debts due it here accumulated from the business. The court held the property taxable here; and after pointing out that the court had previously determined that the property of a non-resident temporarily in the state does not acquire a situs here, but is taxable at the domicile of the owner, the court said: 'But this court has

never held that when a non-resident of this state, establishes a business in this state, from which money is derived and other property is accumulated, such property should be relieved from taxation. In our opinion the accumulations from the business of appellee are not temporarily in this state, within the meaning of the decisions referred to. In this case we have a non-resident with an established business, agents residing here who manage it, and an income of over \$40,000 annually. Its business received the same protection as the business of the citizen under the laws of the state, and should be compelled to share equally the burden. *The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government.* Persons should not be permitted to avail themselves of the benefit of the laws of the state in the conduct of their business within its limits, and then escape their due contribution to the public needs.'

* * * * * *

Since these cases were decided, the question was again before the United States Supreme Court in *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. Ed. 853, 27 Sup. Ct. Rep. 499. In that case the insurance company was in the business of lending money in Louisiana, and employed a local agent to conduct the business. To escape taxation, it removed from the state the notes taken for the money, and had them sent to the home office in New York. The Supreme Court held that the money was taxable in Louisiana, and not in New York. After referring to its previous decisions, the court said: 'In this case, the controlling consideration was the presence in the state of the capital employed in the business of lending money, and the fact that the notes were not continuously present was regarded as immaterial. It is impossible to distinguish the case now before us from the *Bristol Case*, 177 U. S. 133, 44 L. Ed. 701, 20 Sup. Ct. Rep. 585. Here the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the state. The notes and securities were in Louisiana whenever the business exigencies required them to be there. Their removal with the intent that they shall return whenever needed, their long continued, though not permanent, absence, cannot have the effect of releasing them as the representatives of investments in business in the state, from its taxing power. The law may well regard the place of their origin to which they intend to return as their true home, and leave

out of account temporary absences, however, long continued. Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth.'

The question in this case is not whether the property in question has been taxed in Cuba or Porto Rico. The question is simply. Is it taxable here? If it has not been taxed there, it may still be taxed perhaps. If not, that fact will not confer jurisdiction to tax it here. In *People ex rel Yellow Pine Co. v. Barker*, 155 N. Y. 665, 49 N. E. 1103, and *Id.*, 23 App. Div. 524, 48 N. Y. Supp. 555, the Court of Appeals of New York reached the same conclusion as was announced by this court in the *Dun case* on practically similar facts. Other similar decisions are referred to in the cases cited. *The business of the corporation was carried on entirely outside of Kentucky. Its property, though intangible, had no situs in Kentucky. It was never here. It was taxable where the business was carried on. If it could be taxed there and elsewhere, it would be twice taxed. It cannot be taxed here unless within the jurisdiction of the state, under the repeated decisions of the United States Supreme Court. No practical distinction can be drawn between the money of the company in its office in Cuba, or that deposited in a bank there, or that due on its books for its product which has been sold, and not paid for. It is all employed in the business in Cuba or Porto Rico. It has its situs there. It has no situs in Kentucky."*

Commonwealth v. West India Oil Refining Co., 138 Ky. 828, 129 S. W. 301.

In *Louisville etc. Ferry Co. v. Kentucky*, 188 U. S. 385, it appeared that the Ferry Company was organized as a corporation under the laws of Kentucky. It was operating a ferry across the Ohio River between Jeffersonville, in Indiana, and Louisville, in Kentucky, under two franchises, one granted by Indiana for maintaining a ferry across the river from the Indiana shore to the Kentucky shore, and the other granted by Kentucky for maintaining a ferry from the Kentucky to the Indiana shore. A Kentucky statute required certain corpora-

tions to make annual reports setting forth detailed information as to their stock and business and this statute provided that the actual value of the capital stock of the corporation should be appraised and that there should be deducted from this appraised value the assessed value of all tangible property and that the remainder "shall be the value of its corporate franchise subject to taxation." In determining the value of the company's capital stock for the purpose of taxation under this statute, the Kentucky assessing officials refused to allow any deduction on account of the Indiana franchise under which the company was operating in the state of Indiana. This action of the Kentucky assessing officials was upheld by the Kentucky courts but when the case came before this court, it held that the Company could not be taxed in Kentucky, either directly or indirectly, on account of the Indiana franchise. This court made the following statement:

"As, then, the privilege of maintaining the ferry in question from the Indiana shore to the Kentucky shore is a franchise derived from Indiana, and as that franchise is a valuable right of property, is it within the power of Kentucky to tax it directly or indirectly? It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. *This view sacrifices substance to form. If the Board of Valuation and Assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Kentucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana the result would have been the same as if it had assessed, as it did assess, the Kentucky franchise as a unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise.*

The learned counsel for Kentucky says that it is the value of the company's franchise contained 'in its charter' which is the subject of taxation. But the franchise obtained from Indiana is not in the company's charter grant-

ed by Kentucky. It is contained only in the act of the Legislature of Indiana. The Indiana franchise was not carried into the charter of the Kentucky corporation by reason of that corporation having the authority to purchase it. Its existence and validity depend entirely upon the laws of Indiana.

Counsel further say that Kentucky does not impose a tax upon the company's privilege, as such, granted by the State of Indiana. If it had done so the tax so imposed would not have been defended as valid. Yet by her statute, under which the Board of Valuation and Assessment proceeded, Kentucky has accomplished that result by including for purposes of taxation, in the valuation of the franchise granted by it, the value of the franchise granted by Indiana, and then taxing the franchise of the Kentucky corporation upon the basis of the aggregate value of both franchises. Although now owned by one corporation these are separate franchises.

There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an incorporeal hereditament, which has its situs in Indiana. While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional Government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government.

* * * In *Cooley on Taxation*, the author, while conceding that the legislative power extends over everything, whether it be person, property, possession, franchise, privilege, occupation or right, says that '*persons and property not within the territorial limits of a State cannot be taxed by it;*' and that '*a State can no more subject to its power a single person or a single article of property whose residence or legal situs is in another State, than it can subject all the citizens or all the property of such other State to its power*'. 2nd Ed. pp. 5, 55, 159.

We recognize the difficulty which sometimes exists in particular cases in determining the situs of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment and recognize the general rule that the power of the State to tax is limited to subjects within its jurisdiction or over which it can exercise dominion. No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an

incorporeal hereditament derived from and having its legal situs in that State. It is not within the jurisdiction of Kentucky. *The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana.*"

Louisville etc. Ferry Co. v. Kentucky, 188 U. S. 385, 395-398.

The above decisions establish that, on the facts in this case, the situs of the Cream of Wheat Company's intangible property is only where its tangible property is located and its business conducted, namely, beyond the borders of North Dakota; and that, on the facts in this case, North Dakota is as powerless to tax intangible property the situs of which is beyond its borders, as it is to tax tangible property beyond its borders.

CERTAIN CASES DISTINGUISHED.

In the course of its opinion (Record p. 117) the North Dakota Supreme Court makes the following statement:

"'Undoubtedly,' said Mr. Justice Hughes, speaking for the United States Supreme Court, (*Hawley v. Malden*, 232 U. S. 1, 58 L. Ed. 477, 482), the state in which a corporation is organized may provide, in creating it, for the taxation in that state of all its shares whether owned by residents or non-residents.'"

The decision so referred to by the North Dakota Supreme Court, *Hawley v. Malden*, 232 U. S. 1, involved a question entirely different from the question presented in this case. That

decision did not involve taxation of the corporation on property of the corporation, but, on the contrary, it involved taxation of the shareholders on their property in the shares of stock,—taxation of that peculiar right or chose in action belonging to a stockholder which a share of stock represents. That the two questions are entirely distinct and different is shown by the following statement made by Mr. Justice Hughes in the case cited—

“It is well settled that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed (*Van Allen v. Assessors*, 3 Wall. 573, 584; *Farington v. Tennessee*, 95 U. S. 679, 687; *Tennessee v. Whitworth*, 117 U. S. 129, 136, 137; *New Orleans v. Houston*, 119 U. S. 265, 277); and the rulings in the state cases which we have cited proceed upon the view that shares are personal property and, having no situs elsewhere, are taxable by the state of the owner’s domicile whether the corporations be foreign or domestic” (pp. 9-10).

“When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax is not dependent upon the location of the lands and chattels of the corporation” (p. 11).

Hawley v. Malden, 232 U. S. 1, 9-10, 11.

That the two questions are entirely distinct and different is also shown by other decisions of this court.

Powers v. Detroit & Grand Haven R. R., 201 U. S. 543.

Home Savings Bank v. Des Moines, 205 U. S. 503.

In *Powers v. Detroit & Grand Haven R. R.*, 201 U. S. 543, this court, Mr. Justice Brewer speaking, stated the distinction as follows:

“That a distinction exists between that which is the property of the several shareholders and subject to taxation as other property belonging to them, and that which is the property of the collective incorporated person we

call a corporation, and subject to taxation as such, has been repeatedly pointed out."

Powers v. Detroit & Grand Haven R. R., 201 U. S. 543, 559-560.

Again in *Home Savings Bank v. Des Moines*, 205 U. S. 503, this court, Mr. Justice Moody speaking, used this language:

"Shares in corporations are property entirely distinct and independent from the property of the corporation. The tax on an individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself."

Home Savings Banks v. Des Moines, 205 U. S. 503, 516. 517.

It is clear from the language just quoted, that cases like *Hawley v. Malden*, 232 U. S. 1, have no application to the present case.

The North Dakota Supreme Court in its opinion (Record, p. 118), also refers to *Southern Pacific Company v. Kentucky*, 222 U. S. 63. This case is typical of a class of cases which have to do with the taxation of vessels and ships, tangible personal property which sometimes has but more often does not have an actual situs, and which would escape taxation altogether if some situs were not arbitrarily assigned to it. In such a situation the property will be deemed to be situated at the owner's domicile, the rule giving way whenever there is an actual situs elsewhere (*Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299; the cases are collected at page 69 of 222 U. S.).

Cases like *Southern Pacific Company v. Kentucky*, 222 U. S. 63, can therefore have no application to a case like the present wherein the tangible property with which the intangible is bound up, has an actual, fixed business situs beyond the borders of the state.

CONCLUSION.

It has been demonstrated that the statute in question imposes a property tax and not a franchise tax; that, on the facts in this case, the situs of the intangible property of the Cream of Wheat Company is only where its tangible property is located and its business conducted, namely, beyond the borders of North Dakota; and that, on the facts in this case, North Dakota is equally as powerless to tax intangible property, the situs of which is beyond its borders, as it is to tax tangible property beyond its borders. Therefore, the judgment and decision of the North Dakota Supreme Court and the statute in question, as construed and enforced by that decision and judgment, operate, on the facts in this case, to impose a tax on property, no part of which is within the territorial limits of North Dakota, and said decision and judgment and said statute, as so construed and enforced, operate, if sustained, to take the property of plaintiff in error without due process of law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

The judgment herein complained of should be reversed and judgment should be entered cancelling and annulling each and all of the attempted taxes and assessments in question.

Respectfully submitted,

ROME G. BROWN,

ARNOLD L. GUESMER,

HARRY S. CARSON,

Attorneys for Plaintiff in Error

APPENDIX.

Containing the following, all referred to in the foregoing brief:

I. North Dakota Statutes:

- (1) Section 2110, Compiled Laws of North Dakota for 1913.
- (2) Section 2103, Compiled Laws of North Dakota for 1913.
- (3) Section 7846, Compiled Laws of North Dakota for 1913.
- (4) Chapter 222 of the Session Laws of North Dakota for 1919.

II. Decision of North Dakota Court:

- (1) Decision of the trial court with its memorandum of authorities and its findings of fact, conclusions of law and order for judgment.
- (2) Decision of North Dakota Supreme Court, including dissenting opinion of Justice Robinson.



I. NORTH DAKOTA STATUTES.

(1) SECTION 2110 COMPILED LAWS OF NORTH DAKOTA FOR 1913.

Sec. 2110, *Property of companies or associations*, how and by whom listed. The president, secretary or principal accounting officer of any company or association, *whether incorporated or unincorporated*, except banking corporations whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

1. The name and location of the company and association.
2. The amount of capital stock authorized and the number of shares into which said capital stock is divided.
3. The amount of capital stock paid up.
4. The market value, or if they have no market value, then the *actual value* of the shares of the stock.
5. The total amount of all indebtedness except the indebtedness for current expenses, excluding from such expenses the amount paid for purchase or improvement of property.
6. The value of all real property, if any.
7. The value of its personal property.

The aggregate amount of the fifth, sixth and seventh items shall be deducted from the total amount of the fourth, and the remainder, if any, shall be listed as "bonds or stocks," under subdivision 23 of Section 2103. The real and personal property of each company or association shall be listed and assessed the same as other real and personal property. In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain.

Section 2110, Compiled Laws of North Dakota for 1913.

(2) SECTION 2103, COMPILED LAWS OF NORTH DAKOTA FOR 1913.

Sec. 2103. Value to be fixed by assessor. Items of list. It shall be the duty of the assessor to determine and fix the true and full value of all items of personal property included in such statement, and enter the same opposite such items respectively, so that, when completed, such statement shall truly and distinctly set forth:

1. The number of horses one year old, two years old, three years old and over, and separately the number of stallions kept for service, with the value thereof, in the separate classes.

2. The number of cattle one year old, two years old; the number of cows three years old and over; the number of work oxen, and the number of all other cattle three years old and over, and the value thereof, in the separate classes.

3. The number of mules and asses one year old, two years old, three years old and over, and the value thereof, in the separate classes.

4. The number of sheep and the value thereof.

5. The number of hogs and the value thereof.

6. The number of sleighs, sleds, wagons, carriages and all wheeled vehicles of whatsoever kind, including bicycles and the value thereof.

7. The number of melodeons and organs and the value thereof.

8. The number of pianofortes and the values thereof.

9. The value of household furniture.

10. The value of agricultural tools, implements, and machinery.

11. All threshing machines, engines and boilers, and the value thereof.

12. The value of gold and silver plate and plated ware.

13. The value of diamonds and jewelry.

14. *The value and description of every franchise, annuity, royalty and patent right.*

15. The value of every steamboat, sailing vessel, wharve boat, barge or other water craft.

16. The value of goods and merchandise which such person is required to list as a merchant.

17. The value of materials and manufactured articles which such person is required to list as a manufacturer.

18. The value of manufacturer's tools and implements and machinery, including engines and boilers.

19. The amount of moneys other than of banks, bankers, brokers or stock jobbers.

20. The amount of credits other than of banks, bankers, brokers or stock jobbers.

21. The amount and value of bonds and stocks, other than bank stock.

22. The number of shares of bank stock and the value thereof.

23. The amount and value of shares of capital stock of companies and associations not incorporated by the laws of the state.

24. The value of stock and furniture of sample rooms and eating houses, including billiard tables or other similar tables.

25. The value of all other articles of personal property, not included in the preceding twenty-four items.

26. The value of all elevators, warehouses and granaries and of all grain contained in either thereof, wheresoever the same may be situated.

27. The value of all improvements, except plowing on lands held under the law of the United States, to which final certificates of entry have not issued, and on lands the title to which is vested in any railroad company.

Section 2103, Compiled laws of North Dakota for 1913.

(3) SECTION 7846, COMPILED LAWS OF NORTH DAKOTA FOR 1913.

Sec. 7846. Appeals in cases tried without jury. In all actions tried by the district court without a jury, in which an issue of fact has been joined, excepting as hereinafter provided, all the evidence offered on the trial shall be received. Either party may have his objections to evidence noted as it is offered; but no new trial shall be granted by the district court on the ground that incompetent or irrelevant evidence has been received, or on the ground of the insufficiency of the evidence. A party desiring to appeal from a judgment in any such action, shall cause a statement of the case to be settled within the time and in the manner prescribed by article 8 of chapter 11 of this code, and *shall specify therein the questions of fact that he desires the supreme court to review, and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court.* Only such evidence as relates to the questions of fact to be reviewed shall be embodied in this statement. But if the appellant shall specify in the statement that he desires to review the entire case, all the evidence and proceedings shall be embodied in the statement. All incompetent and irrelevant evidence, properly objected to in the trial court, shall be disregarded by the supreme court but no objection to evidence can be made for the first time in the supreme court. The supreme court shall try anew the question of fact specified in the statement or in the entire case, if the appellant demands a retrial of the entire case, and shall finally dispose of the same whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court; the supreme court may, however, if it deem such course necessary to the accomplishment of justice, order a new trial of the action. In actions

tried under the provisions of this section, failure of the court to make findings upon all the issues in the case shall not constitute a ground for granting a new trial or reversing the judgment; provided, that the provisions of this section shall not apply to actions or proceedings properly triable with a jury.

Section 7846, Compiled Laws of North Dakota for 1913.

(4) CHAPTER 222 OF THE SESSION LAWS OF NORTH DAKOTA FOR 1919.

Section 1. On and after January first, 1919, taxes shall be and hereby are imposed annually as follows:

(1) Every corporation, joint-stock company or association, now or hereafter organized in the state for profit and having a capital stock represented by shares or issuing bonds, shall pay annually a *special excise tax* with respect to the carrying on or doing business in the state by such corporation joint-stock company, or association during the previous calendar year, equivalent to 50 cents for each \$1,000.00 of the fair value of its capital stock or bonds issued; and in estimating the value of capital stock, the surplus and undivided profits of such corporation, joint-stock company or association shall be included. The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock and bonds for the preceding year; provided, that for the purpose of this tax an exemption of \$10,000.00 shall be allowed from the capital stock of any such corporation, joint-stock company or association.

(2) Every corporation, joint-stock company or association, now or hereafter organized under the law of any other state, the United States or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a *special excise tax* with respect to the carrying on or doing business in the state by such corporation, joint-stock company or association, equivalent to 50 cents for each \$1,000.00 of the capital actually invested in the transaction of business in the state; provided, that in the case of a corporation engaged in business partly within and partly without the state, investment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within the state bears to its total business within and without the state and where such business within the state is not otherwise more easily and certainly separated from such entire business within and without the state, business within the state shall be held to mean such proportion of the entire business within and without the state, as the property of such corpora-

tion within the state bears to its entire property employed in such business both within and without the state; provided, that in the case of a railroad, telephone, telegraph, car or freight-line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year; provided, that for the purpose of this tax an exemption of \$10,000.00 from the amount of capital invested in the state shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the Tax Commissioner all the information necessary to its computation.

Section 2. There shall not be taxed under this Act any

- (1) Labor, agricultural, or horticultural organizations;
- (2) Mutual savings bank not having a capital stock represented by shares;
- (3) Fraternal beneficiary society, order or association, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association, or other dependents;
- (4) Domestic insurance company or building or loan association or co-operative bank, organized and operated for mutual purposes and without profit;
- (5) Cemetery company owned and operated exclusively for the benefit of its members;
- (6) Corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stock holder or individual;
- (7) Business league, chamber of commerce, or board of trade, not organized for profit and no part of the net income of which inures to the benefit of any private stock holder or individual;
- (8) Civic league organization not organized for profit, but operated exclusively for the promotion of general welfare;
- (9) Club organized and operated for pleasure, recreation or other non-profitable purposes, no part of the net income of which inures to the benefit of any private stock holder or member;

(10) Farmers' or other mutual hail, cyclone, crop or fire insurance company, mutual or co-operative telephone or like organization of a purely local character, the income of which consists solely of assessments, dues or fees collected from members for the sole purpose of meeting its expenses;

(11) Farmers' mutual warehouse, elevator, creamery, packing or canning company or like organization; farmers, or like association organized and operated as a sales agent for the purpose of marketing the products of its members, or any other organization having a membership and not conducted for profit but for the service of its members or the public.

(12) Corporation or association organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this Act;

(13) Federal Land Bank or National Farm Loan Association, as provided in Section 26 of the Act of Congress approved July 17, 1916, entitled An Act to provide capital for agricultural developments, to create standard forms of investment based upon farm mortgages, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories and financial agents for the United States, and for other purposes;

(14) Corporation owned and operated by the State.

Section 3. Every corporation, joint-stock company or association subject to the tax herein imposed, shall, on or before the first day of August, 1919, and on or before the first day of March each year thereafter, make a report to the State Tax Commissioner, which shall include the following:

(1) The name of the corporation, joint-stock company or association, the place where incorporated, the date of incorporation and the purpose for which incorporated;

(2) The names and addresses of the President or Vice President, Secretary, Treasurer and the General Manager or chief representative in the State, or, if no representative in the state, then the General Manager or chief representative elsewhere;

(3) The principal place of business in the state, or if no place of business in the state the chief place of business outside of the state.

(4) The number of shares of stock issued, the number subscribed and paid up and the par and actual or market value of the same, and all issues of stock during the previous calendar year;

(5) All bond issues previous to the date of making return, and all bond issues during the previous calendar year.

Such returns shall be sworn to by the president, vice-president or other principal officer, and by the treasurer or assistant treasurer and may be made to the commissioner or to his authorized agent in the district in which is located the principal office of the corporation, joint-stock company or association. Such report shall be made in the form and manner prescribed by the commissioner, who shall furnish to each corporation, joint-stock company or association coming within the provisions of this Act all necessary forms and blanks upon which to make the return; provided, that such blanks and forms shall be insofar as practical, similar to those prescribed by Congress for making returns to the United States Commissioner of Internal Revenue for the purposes of the federal tax on corporations, joint-stock companies and associations; provided, further, that every such corporation, joint-stock company or association shall file with the State Tax Commissioner a duplicate of the return made by it to the United States Commissioner of Internal Revenue, and shall in addition furnish to the Commissioner all other information required by this Act, and all information reasonably necessary to enable the Commissioner to carry out its provisions.

Section 4. The tax herein imposed shall be assessed by the State Tax Commissioner, on or before the fifteenth day of August, 1919, and on or before the first day of August of each year thereafter, who shall certify the amount of such tax in each case to the State Auditor; and within twenty days thereafter the Auditor shall make his draft upon such corporation, joint-stock company or association for the amount of the tax due as certified and shall present the same to the State Treasurer for collection. Within twenty days thereafter the State Treasurer shall make demand for the payment of such warrant; and if any such corporation, joint-stock company or association shall fail to pay the same within thirty days after such demand, a penalty of 10 per cent thereof shall immediately accrue, and thereafter 1 per cent for each month after the tax becomes delinquent, while the same remains unpaid. Such tax being delinquent and unpaid shall be a first lien upon all and singular the property, estates and effects of such corporation, joint-stock company or association within the State, and shall take precedence over all other demands and judgments against the same; and the certificate of the Tax Commissioner that such tax is due, and the unpaid draft of the State Auditor issued in pursuance thereof, shall be sufficient warrant for the Attorney General to institute proceedings for the collection of said tax and penalty by the sale of said property or otherwise; and the Attorney General shall enter such pro-

ceedings on the certification of the State Auditor that such tax is due and unpaid 30 days after demand for payment has been made as herein provided. Such penalty shall be added to the tax and shall be demanded and paid in the same manner as provided for the tax itself. When any such tax shall have been delinquent for ninety days it shall, in case of a North Dakota corporation, constitute sufficient ground for the annulment of the existence of such corporation in an action instituted by the Attorney General for the purpose, and in the case of a foreign corporation, on the certificate of the Tax Commissioner that such tax has been due for ninety days and remains unpaid, the Secretary of the State shall cancel the registration of such corporation and notify it that all of its privileges under the laws of the State are suspended until such tax, together with all penalties provided in this Act, has been paid.

Section 5. All moneys collected under the provisions of this Act shall be paid into the State Treasury to be used for the defraying of the general expenses of the State Government.

Section 6. All administrative, special and general provisions of law, including the general tax laws of the State, insofar as consistent with the provisions of this Act, are hereby extended and made applicable to all the provisions herein contained.

Section 7. If any clause, sentence, paragraph or part of this Act, shall for any reason be declared invalid by a court of competent jurisdiction, such judgment shall not impair or invalidate any other clause, sentence, paragraph or part thereof, but any such part shall be of full effect and validity, as if no such decision had been rendered.

Section 8. All Acts and parts of Acts in conflict with this Act are hereby repealed.

Approved March 7, 1919.

II. DECISION OF NORTH DAKOTA COURT.

- (1) DECISION OF THE TRIAL COURT WITH ITS MEMORANDUM OF AUTHORITIES AND ITS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT.

Charles M. Cooley, District Judge:

In this action the County of Grand Forks, as plaintiff, is seeking to recover a judgment against the defendant, Cream of

Wheat Company, a corporation, for certain taxes alleged to be due and owing by the latter for the years 1908 to 1914 both inclusive.

The defendant, in its answer to the plaintiff's complaint sets up various defects and irregularities in the proceedings culminating in the assessment for the several years, and in addition makes the claim that in none of the years did the corporation own or possess any property subject to taxation in the State of North Dakota.

The defendant, Cream of Wheat Company is, and for a number of years prior to 1908 had been a corporation organized under the laws of the State of North Dakota for the manufacture and sale of a cereal known as Cream of Wheat. In its articles of incorporation, the City of Grand Forks is designated as its principal place of business. At no time, however, during any of the years mentioned, has the defendant corporation maintained any office in North Dakota, nor has it owned or possessed any tangible property in said State. Its executive offices are maintained in the State of Minnesota, where its books and records are kept, and where its real and personal tangible property is, and always has been located.

It is conceded by counsel for plaintiff that the taxes which have been levied against the defendant for the several years have been so levied solely on account of its corporate franchise; that is, the right granted to the incorporators by the State to do business in a corporate capacity. In a general way the franchises of a corporation have been classified as primary, and secondary.

"The right of an incorporated company to be a corporation, or the right conferred upon it by the State, to be an artificial body, has been called its primary franchise, and this has been distinguished from what is termed its secondary franchises, which include the right to carry on or transact a particular kind of business, as in the case of the privileges granted to a water company with the right to take tolls, etc.; or the right of a railroad company to collect fares; or of a toll road company to exact toll for services performed. * * * So in certain tax cases the distinction between the franchise to be a corporation and other rights, privileges and franchises of the corporation, has been the subject of much discussion and many adjudications."

Joyce on Franchises, Sec. 8.

The primary franchise, "the right to be" is often designated as the "general franchise" or the "corporate franchise," while

the secondary franchises "the right to do," are designated as "special franchises."

The cases are unanimous in holding that the special franchises of a corporation are "property". There are also many cases in which it is held that a "corporate franchise" is property, but it will generally be found that this is due to some specific provision of the State Constitution or statute. There is also a woeful laxity in the use of terms by the Courts in speaking of franchises. For instance, in the Duluth Gas & Water Co. case the Court uses the term "Corporate Franchises" as applying to both the primary and secondary franchises, and in numerous cases the term "franchises" may be construed to cover the corporate franchise, although in fact special franchises were the only franchises under consideration.

Special franchises, and corporate franchises, when considered as property, are deemed the intangible property of the corporation, as distinguished from the tangible property. As before stated, it is the corporate franchise of the defendant that the plaintiff has sought to tax in this case. There is no attempt made to tax tangible property.

Counsel in their brief say:

"The intangible property taxed in the instant case is the right of the defendant to exist."

Now there is no law in this state authorizing, or providing for the assessment or taxation of corporate franchises as such. The only provisions of the law in this State authorizing or providing for the assessment and taxation of the tangible or intangible property of the corporations of the class to which this defendant belongs, are those contained in the Constitution and in the general revenue laws. Section 176 of the Constitution provides that:

"Laws shall be passed taxing by uniform rule all property according to its true value in money."

And such laws must be general, not local or special.

Constitution; section 69, subdivision 23.

Pursuant to these constitutional provisions general revenue laws have been passed by the legislature providing for the taxation of the tangible and intangible property of corporations.

Section 2075, Chapter 34 of the Rev. Codes of 1913, provides:

"All real and personal property in this state, and all personal property of persons or of corporations residing or doing business therein, and the property of corporations residing or doing business therein, and the property of corporations new

existing or hereafter created, * * * is subject to taxation, and such property, or the value thereof, shall be entered in the list of taxable property for that purpose, in the manner prescribed by this chapter."

Section 2093: "All property subject to taxation shall be listed and assessed every year, at its value, on the first day of April preceding the assessment."

Section 2094: Provides that all personal property of corporations shall be listed by the president, agent or officer of such corporation.

Section 2102: "Every person required by this chapter shall, when called upon by the assessor, make out and deliver to the assessor, a statement verified by oath, of all the personal property in his possession or under his control, and which by the provisions of this chapter he is required to list for taxation, either as an owner or holder thereof, or as * * * ; but no person shall be required to include in his statement any share or portion of the capital stock or property of any company or corporation which such company or corporation is required to list or return as its capital or property for taxation in this state."

Section 2103: "It shall be the duty of the assessor to determine and fix the true and full value of all items of personal property included in such statement, and enter the same opposite such items respectively, so that, when completed, such statement shall truly set forth": (Then follows a list of 27 items of which No. 21 is as follows): "21. The amount and value of bonds and stocks other than bank stock."

Sec. 2110: The president, secretary or principal accounting officer of any company or association, whether incorporated or unincorporated, except banking corporations whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

1. The name and location of the company and association.
2. The amount of capital stock authorized and the number of shares into which said capital stock is divided.
3. The amount of capital stock paid up.
4. The market value, or if they have no market value, then the actual value of the shares of the stock.
5. The total amount of all indebtedness except the indebtedness of current expenses, excluding from such expenses the amount paid for purchase or improvement of property.
6. The value of all real property, if any.
7. The value of its personal property.

The aggregate amount of the fifth, sixth and seventh items shall be deducted from the total amount of the fourth, and the remainder if any, shall be listed as 'bonds or stocks' under subdivision 21 of Section 2103. The real and personal property of each company or association shall be listed and assessed the same as other real and personal property. In case of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain."

In this case no statement such as is provided for in Section 2110 was made out by any officer of the corporation in any of the years, but was made by the city assessor and by other proper officers authorized to make assessments of property that had escaped taxation. The taxing officers had no data from which to arrive at the amount or value to be assessed as "bonds and stocks," but it was somewhat arbitrarily fixed at \$50,000 for each of said years. While the defendant entered a protest against the assessment, it made no offer, and wholly failed to give any of the information required by section 2110.

The undisputed testimony shows that during none of said years did defendant own any "bonds or stocks," and upon the trial counsel for plaintiff admitted that the assessments and taxes were assessed and levied solely under section 2110 above quoted, and upon defendant's intangible property as evidenced by the excess in value of its capital stock over and above the value of its tangible property.

Although the assessment was concededly made under section 2110, and although it is alleged in the complaint that the County Auditor, during the year 1914 duly assessed certain personal property (of the defendant corporation) "as property having escaped taxation," and that during the year 1914 the City Assessor "duly assessed for the year 1914 certain personal property belonging to defendant, * * * to-wit: 'Bonds and stocks,' " and that these assessments were duly reviewed and equalized by the County and State Boards, and that the County Auditor entered and extended upon the tax list "against the said property of said defendant" taxes for each of said years; and although the resolution passed by the Board of County Commissioners authorizing the commencement of this action, recites:

"Whereas, personal property of the Cream of Wheat company, a corporation, has been duly assessed for the years 1908 to 1913 inclusive, and whereas, all of such personal property taxes are now delinquent," yet counsel for plaintiff contends that the tax which the plaintiff seeks to recover in this action is not a "property tax" but an "excise tax."

In their brief, counsel for plaintiff, with reference to the tax assessed in this case, say:

"It is not a tax upon the capital stock of the corporation; neither is it a tax against the individual stockholders, but it is an excise tax against the corporation itself, and as such is not in any sense a property tax."

Again, they say:

"Should the value of the capital stock, however, exceed the value of all the property, both real and personal of the corporation, there is then an excise tax levied against the difference. This however is not a tax levied under the general property system, but is purely and simply an excise tax."

And in conclusion, counsel say:

"The tax in question is not a property tax, but is a tax on the franchise of being a corporation, that is, a tax levied for the privilege of various individuals going together as a corporation, thereby claiming all the benefits which a corporation has in the active affairs of commercial life over a partnership or over the transaction of an individual; such tax is not a property tax; neither is it a tax on the special franchise of a corporation, because in this case the corporation has no special franchise. The tax is an excise tax and is not subject to the rules of uniformity demanded in the constitution."

The Supreme Court of the United States, in *Flint v. Stone-Trap Co.*, 220 U. S. 107, said:

"Excise are taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue occupations and upon corporate privileges."

And in *State v. Grand Trunk R. Co.*, 142 U. S. 217, in speaking of an excise tax, the Court say:

"The designated excise tax does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings * * * or to exercise particular franchises."

An "excise tax," when imposed upon a corporation for the privilege of existing and doing business as a corporation, is termed a "franchise tax" as distinguished from a "property tax" when levied upon special franchises. As was said in *Hamilton Company v. Mass.*, 6 Wall. 632, 640, with reference to certain provisions of the Mass. Constitution:

"Property taxation and excise taxation, as authorized in the Constitution of the State, are perfectly distinct, and the two systems are easily distinguished from each other."

And in *Provident Institution v. Mass.*, 6 Wall. 611, 631, the Court said:

"Franchise taxes are levied directly by an act of the legis-

lature, and the corporations are required to pay the amount into the State Treasury. They differ from property taxes, as levied for State and municipal purposes, in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection."

Sometimes these franchise taxes are in lieu of all other taxes, but it is more often the case that both a property and a franchise tax is authorized by statute.

One of the marked characteristics of an excise tax is that it is levied directly by the legislature, and another is, that it is payable into the state treasury. It is a tax levied, not against the property of a corporation, but against the corporation itself, and the method of arriving at the amount of tax to be paid varies in different states, and as applied to different kinds of corporations; *Society for Savings v. Coite*, 6 Wall. 594, 608.

I doubt if any case can be found in which it appears that a "franchise tax," as such, has ever been assessed by local authorities, excepting in cases wherein it was included, as a mere incident, with other intangible property and special franchises.

Counsel for plaintiff has cited many cases in support of their contention that the tax in this case is an excise (franchise) tax.

Among the cases cited are a number of Massachusetts cases, and a few United States Supreme Court cases appealed from Massachusetts, and construing its laws.

In the case of *Provident Institution v. Mass.*, 6 Wall. 611, it appears that by a provision of the State Constitution, the Legislature was empowered "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident, and estates lying within the said commonwealth, and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatever." By some certain earlier decision of that State, it had been held that the term "commodities" as used in the Constitution included "corporate franchises." A provision of the state statute provided that every institution for savings incorporated under the laws of the Commonwealth should pay to the Commonwealth, "a tax on account of its depositors of one-half of one per cent per annum on the amount of its deposits." It was held in that case that the tax was a franchise tax and not a property tax.

Hamilton Company v. Mass., 6 Wall. 632, was a case arising under a law of Massachusetts, which provided that every corporation should annually pay to the state treasurer a tax of one and one sixth per cent upon the excess of the market value of its capital stock over the value of its real estate and personal property. It was held that this was a franchise tax and not a property tax.

The other Mass. cases cited construe the same or similar provisions of the statutes of that state.

Counsel have cited *Society for Savings v. Coite*, 6 Wall. 594. In this case it appears that a statute of the State of Connecticut required savings societies authorized to issue bills, and having no capital stock, to pay into the state treasury a sum equal to three-fourths of one per cent on the total amount of their deposits on a given day, and it was held that this statute imposed a franchise tax, and not a tax on property. The Court say:

"Reference is evidently made to the total amount of deposits on the day named, not as the subject matter for assessments, but as the basis for computing the tax required to be paid by the corporation defendants."

The case of *Home Ins. Co. v. New York*, 134 U. S. 594, was one arising under the laws of New York State. An act of the Legislature of that state declared that every corporation incorporated under any law of the state or any other state or country, and doing business in the state, should be subject to a tax upon "its corporate franchise or business to be computed as follows: If its dividend or dividends made or declared during the year ending the first day of November, amount to six per cent or more upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per cent of the dividends, etc." It was held not to impose a property tax, but was, as it purported to be, a franchise tax. Construing a similar statute the court, in *People v. Knight*, 67 N. E. 65 (N. Y.) said:

"A franchise tax is not laid upon property at all, but is imposed upon the corporation for the privilege of carrying on business in this state, and exercising the corporate franchises granted by the state. The distinction between a tax upon the property of a corporation and a franchise tax, although well established and of great importance, is easily overlooked."

See also, *Lumberville, etc. Bridge Co. v. State Board*, 26 Atl. 711 (N. J.)

The case of *Minot v. Railroad Company* (otherwise known as the *Delaware Railroad Tax Case*), 18 Wall., 206, involved the construction of the fourth section of an act of the state of Delaware which provided that every company of the class designated should, in addition to other taxes, also pay to the treasurer of the state for its use, on the first day of July in each year, a tax of one-fourth of one per cent upon the actual cash value of every share of its capital stock. The court say (p. 231):

"As we construe the language of the fourth section, the tax is neither imposed upon the shares of the individual stockholders

nor upon the property of the corporation, but it is a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though an arbitrary one is approximately just; at any rate is one which the Legislature of Delaware was at liberty to adopt."

The case of *Horn Silver Mining Co. v. New York*, 143 U. S. 305, much relied upon by counsel for plaintiff, involves the question of the validity of the same law that was involved in the case of *Home Insurance Co. v. New York*, *supra*. The Mining Company was a corporation organized under the laws of Utah, but doing business in a number of states, including the State of New York, though but a small part of its business was transacted in the latter state. The court simply held that the state legislature had the absolute right to impose upon foreign corporations any conditions it might see fit for the privilege of doing business in the state; that however unjust these conditions might be, it was a matter with which the courts had nothing to do, but appeal should be made to the Legislature.

The Pennsylvania, Maryland, Maine and Vermont cases, cited by counsel, involved statutes imposing purely excise and franchise taxes, similar to those I have specifically mentioned. The tax was levied by the Legislature and payable directly to the state.

As an instance of an excise tax, counsel cite the inheritance tax of this state. Code 1913, Sec. No. 8976, *et seq.* This tax is levied by the Legislature and is payable to the state, with the exception of two per cent, which is retained in the county general fund.

In *Standard Underground Cable Co. v. Atty. Gen.*, 19 Atl. 733, (N. J.), it appears that the statute in New Jersey provided that the class of corporations to which the Cable Co. belonged should pay a yearly tax of 1/10 of one per centum of the amount of its capital stock. The court held that this was not a property tax, and did not fall within the provision of the constitution that "property should be assessed for taxes, and by uniform rules, according to its true value."

Referring to the same statute the Court in *Honduras Commercial Co. v. State Board*, 23 Atl. 668 (N. J.), said:

"The tax imposed is a franchise tax, exacted from the Company as the price of the right and privilege which it received from the state of being a corporation. Although the amount to be paid is determined by the amount of the capital stock, and the duration of the corporate life, yet these are only two criteria chosen by the Legislature for ascertaining the probable value of the corporate franchise which the Company assumed.

The tax is not levied upon the corporate property or business. Such a tax may be collected by the State granting the corporate franchise, no matter how the property of the Company may be invested or employed, or where it may be situate."

As has been seen from the cases cited, in the taxation of corporate franchises very different methods are pursued from those pursued in the taxation of property. When corporate franchises are taxed as such alone, the levy is invariably made by the Legislature, arbitrarily and without regard to values; while in the taxation of property of corporations of the class to which defendant belongs, the tax is based upon an assessment by some local officer, and this assessment is based upon the value of the property.

"It is true, as said by this Court in *California v. Pac. R. Co.*, 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the Legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted remedy must be sought by appeal to the Legislature; it cannot be furnished by the federal tribunal."

Home Ins. Co. v. People, 134 U. S. 594.

It is apparent from a survey of all the authorities, not only those cited, but many others, that the tax sought to be recovered in this case is not an excise tax upon the corporate franchise. There is no such thing known to the law of this state.

"The test, whether the tax in any given case is a franchise as distinguished from a property tax, would seem, from the authorities, to be that a tax according to a valuation is a tax upon property, whereas a tax imposed according to nominal value or measured by some fixed standard of mere calculation,—as contrasted with valuation—fixed by the law itself may be a franchise tax."

Joyce on Franchises, Sec. 424, p. 752.

The law under which the tax was imposed upon the defendant provides only for the taxation of the property of the corporation.

See *Detroit F. & M. Ins. Co. v. Hartz*, 94 N. W. 7, (Michigan).

State v. Duluth, G. & W. Co., 78 N. W. 1032 (Minn.)

All corporations and other persons are required by law, to make out, for the purposes of assessment, a list of their personal property. (Sec. 2103). Among the items in this list is "Bonds and Stocks." It is this item of personal property that

is sought to be taxed in this case. This item does not mean the bonds and stocks of other corporations held by the corporation making out the list, but it means its own capital stock—not its entire capital stock, it is true, but an amount determined by computation from the data provided for in Section 2110. The statement provided for by Section 2110 is not an assessment list but is required of corporations simply for the purpose of giving to the local assessor information upon which he may base an intelligent judgment as to “the amount and value of bonds and stocks.” The tangible property of corporations is listed and assessed the same as that of individuals. By means of the statement the local assessor is enabled to list and assess the capital stock representing the value of the intangible property of the corporation. The capital stock represents the corporate estate, whether tangible or intangible.

“A tax on the capital stock of a corporation is a tax on its property and assets.”

Commonwealth v. N. Y. Pr. & O. R. Co., 41 Atl. 594. (Pa.).

Commonwealth v. Beech Creek R. Co., 41 Atl. 605 (Pa.).

People v. Knight, 67 N. E. 65 (N. Y.).

State v. Savage, 91 N. W. 716, 722 (Neb.).

The intangible property of the corporation has been defined as “corporate excess,” “franchises,” “good will,” “system,” “Union in use,” and “business facilities.”

State v. West. Union Tel. Co., 104 N. W. 567 (Minn.)

In the majority of cases it is the good will which makes up the value of the capital stock in excess of the tangible property. If a corporation possesses special franchises, these also go to enhance the value of the stock. And while in one or two states, by reason of peculiar provisions of the constitution or statute, the courts have said that this excess value also includes the value of the corporate franchise, it has been so held only in cases where the corporations possessed also special franchises and there was no attempt to value the corporate franchise alone. It is a matter of common knowledge however, that the corporate franchise alone has no money value. It can neither be mortgaged, leased, levied upon nor sold. Yet in this case the corporate franchise of the defendant has been assessed for each year at \$50,000.

“The franchise or bare right to do a thing considered with reference to itself alone is of no value.”

Sullivan v. Lear, 2 So. Rep. 846 (Fla.)

Section 2103 provides:

“It shall be the duty of the assessor to determine and fix the true and full value of all items of personal property included

in" the statement required by Section 2102 to be made out by individuals, corporations and others. "Bonds and stocks," that is, the intangible property of corporations, is one of these items. The assessor therefore, in assessing this item of intangible property is required to determine and fix the true and full value thereof.

Section 2122 provides:

"All property shall be assessed at its true and full value in money. In determining the true and full value of real and personal property, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price of which said property would sell at auction or at forced sale, or in the aggregate with all the property in the town or district, but he shall value each article or description of property by itself and at such sum or price as he believes the same to be fairly worth in money."

Section 2074 provides:

"The terms used in this chapter are defined as follows: * * * The term 'true and full value' means the usual selling price at the place where the property to which the term is applied shall be at the time of the assessment, being the price which could be obtained therefor at private sale, and not at a forced public auction sale."

Morawetz, in his work on Corporations, at Section 929, says:

"Care must be taken to distinguish between the different meanings of the word value. One meaning of the word is 'price,' or 'the amount for which a thing can be sold.' In this sense franchises have clearly no value whatever, because by their nature they are not transferable. They cannot be sold or leased or mortgaged, nor can they be taken under execution."

See also, *Bank of Calif. v. San Francisco*, 64 L. R. A. 918, dissenting opinions.

In *Detroit Citizens St. Ry. Co. v. Common Council*, 85 N. W. 96 (Mich.) the Court say:

"For the purpose of the discussion of the question before us, we will treat franchises as of three classes: First, the right to organize and exist as a corporation; Second, the right to act generally as a corporation; and Third, the special privileges granted to it which are not possessed by the individual under general laws. * * * The first of these is enjoyed by all corporations, legally formed, and also by all assuming to be corporations through user. This right to exist as a corporation is not transferable, and therefore cannot be said to have a cash value in the sense of our statute. Cash value and actual

value are said to have the same meaning, viz: 'The amount at which property would be estimated if taken in payment of a liquidated demand from a solvent debtor.' Weltz Assessment, Sec. 130, and cases cited. The term is fixed, however, by our statute (Com. Laws, Sec. 3850) which provides: 'The words cash value, when used in this act, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of the assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale.' Apparently, the intention was not to tax property having no cash value. If it were transferable, it would seldom be worth more than a nominal price, by reason of the facility with which such corporations may be organized under our general laws, which is the only way that private corporations can be created in Michigan. Again, franchises of the second class are incident to all corporations, and are manifestly of no more value than the right to exist; for they naturally and impliedly go with it and are not transferable. * * * It seems not to have been the policy of the state to place any price or tax upon the right to exist or act as a corporation until recently. Now a franchise tax is exacted from all newly formed domestic corporations, as well as those of foreign states and countries, which choose to do business within the state. This is in no sense a tax in upon property. * * * The price of these privileges is proportionate to the capital employed. Whether the state might treat these franchises as property and provide for their assessment on an ad valorem basis, we need not inquire. It has not been done, and there seems to be little inducement for such action, because of the trifling value of the abstract right of corporate existence. * * * There is no more excuse for ascribing a fictitious value to property, whether tangible or intangible, than there is justice in undervaluing or omitting it from the tax roll."

See also *Western Union Tel. Co. v. Omaha*, 103 N. W. 84 (Neb.)

But it is unnecessary to seek authorities upon the question as to whether a corporate franchise has any assessable value. That matter has been settled in this state by the statutory definition of "true and full value." If it cannot be transferred it cannot possibly have any value "in money."

While it would be entirely competent for the Legislature to prescribe a corporate franchise tax in the nature of an excise tax, the fact remains, that the Legislature of this state has not done so, and that if the corporate franchise can be reached for taxation at all, it can only be through the provisions of the

statute providing for the taxation of intangible property upon an ad valorem basis.

I am aware that there are numerous cases in which it is said that the "corporate franchise" is property. In many cases this is due to a specific provision of the state constitution or statute declaring it to be property; in many others it is due to the construction given by the courts to certain constitutional or statutory provisions, and in other cases it is due to a careless failure to distinguish between "corporate franchises" and "special franchises."

See *State v. Duluth Gas & W. Co.*, 78 N. W. 1032 (Minn.).

It would serve no good purpose to cite and distinguish all of these cases. It is sufficient for our purpose to consider only the provisions of our own statute. The thing of which there may be ownership is called property (Sec. 5245). The corporation does not own the corporate franchise.

The franchise to be, and to exercise the powers of, a corporation are not granted to or possessed by the corporation. These rights are given to and owned by the individuals composing the corporation. Again, Section 5490 provides, that all property (with two exceptions) may be transferred. Corporate franchises are not transferable, and therefore, cannot be property. A corporate franchise, in the absence of a statutory provision declaring it to be such, is no more property than is a public office.

But even if the corporate franchise be considered as property, it is not the property of the corporation, but of the incorporators. The right to become and be a corporation, and to do business as such, is not granted to the corporation, but to the incorporators, and if the right to possess and use corporate powers is valuable at all, it is valuable only to the incorporators. The corporate franchise, therefore, in the absence of any constitutional or statutory provision to the contrary, is the property of the incorporators rather than of the corporation.

"The franchise of being a corporation belongs to the incorporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation."

Memphis R. R. Co. v. Commissioners, 112 U. S. 609 (619).

Southwestern T. & T. Co. v. City, 73 S. W. 859 (Tex.).

State v. Topeka Water Co., 60 Pac. 337 (Kans.).

Pierce v. Emery, 32 N. H. 484.

Louisville Tobacco W. Co. v. Commonwealth, 48 S. W. 420-423 (Ky.).

Same case, 49 S. W. 1069 (Ky.).

Filstom v. Hay, 13 N. E. 501 (Ill.).

Thompson on Corporations, Sec. 5335.

Cedar Rapids Water Co. v. City, 91 N. W. 1981 (Ia.)

State v. Georgia Med. Soc., 38 Ga. 608, 626.

State v. Portage City Water Co., 83 N. W. 695, 699, (Wis.)

Driscoll v. Norwich & W. R. Co., 32 Atl. 354, 357, dissenting opinion.

Central Trust Co. v. Western N. C. R. Co., 89 Fed. 24.

Blackrock Copper M. & M. Co. v. Tingey, 28 L. R. A. (N. S.) 255 (Utah).

Linden Land Co. v. Mil. E. Ry. Co., 83 N. W. 851, 858, (Wis.).

Sec. 5245 Code 1913.

It is a general and well established principle that the situs of the intangible property of a corporation is where its tangible property is located and its business is carried on, and that a state is as powerless to tax a corporation on intangible property which has been given a business situs beyond the borders of the state, as it is to tax tangible property located beyond its borders, and this rule is not restricted in its application to corporations owning special franchises; for if corporate franchises are to be deemed in any sense property, they belong to the class designated as intangible property. The argument is that these franchises have no value except from their "union in use" with the tangible property, as a system—

Adams Express Co. v. Ohio, 165 U. S. 194.

Same case, 166 U. S. 185.

Western Union Tel. Co. v. Mass., 125 U. S. 530.

Mass. v. Western Union Tel. Co., 141 U. S. 40.

Maine v. Grand Trunk Ry. Co., 142 U. S. 217.

Pittsburg, Cin. etc. Ry. Co. v. Backus, 154 U. S. 421.

Cleveland C. & C. Ry. Co. v. Backus, 154 U. S. 439.

West Union Tel. Co. v. Taggart, 163 U. S. 1.

Pullman's Palace Car Co. v. Penn. 141 U. S. 18.

Louisville etc. Ferry Co. v. Kentucky, 188 U. S. 385.

Commonwealth v. West. Ind. Etc. Co., 129 S. W. 301 (Ky.)

Sullivan v. Lear, 2 So. Rep. 846 (Fla.).

State v. Savage, 91 N. W. 716 (Neb.).

West Union Tel. Co. v. Omaha, 103 N. W. 84 (Neb.).

Detroit Citizens St. Ry. Co. v. Common Council, 85 N. W. 96 (Mich.).

State v. Anderson, 63 N. W. 746 (Wis.).

Fon du Lac W. Co. v. City, 52 N. W. 439 (Wis.).

The only case cited by counsel for plaintiff which militates in any degree against the conclusions I have reached is that of *Bank of California v. San Francisco*, 64 L. R. A. 918. Not only do the cases cited by the California Court (excepting the

California cases) fail to support its conclusions, but throughout its reasoning is illogical and specious. The opinion was handed down by a divided court (four against two) and an application for a rehearing was denied by an evenly divided court.

In my opinion, therefore, the corporation having no property in the state of North Dakota, subject to taxation, in any of the designated years, the assessment and taxation of the defendant was without authority and void and is an attempt to deprive defendant of its property without due process of law.

Dated Grand Forks, N. D., this 18th day of September, 1917.

CHAS. M. COOLEY,

Judge.

As to the questions regarding the defects and irregularities in the assessments, these are resolved in favor of plaintiff.

C. M. C.

Here are some other references which may be useful in case of an appeal.

1 *Cooley on Taxation*, (3rd Ed.) 402, 676 *et seq.*

37 *Cyc.* pp. 756-815-820-1024.

Joyce on Franchises, Chaps. 3-4-24.

22 *Cyc.*, Subject, *Internal Revenue*.

Consolidated Gas Co. v. Baltimore, 1 L. R. A. (N. S.) 263.

Louisville Tobacco Warehouse Co. v. Commonwealth, 57

L. R. A. 33, and extensive note.

Metropolitan St. Ry. Co. v. New York, 199 U. S. 1.

New Jers. St. Ry. Co. v. Mayor, 63 Atl. 833, contains definition of Good Will.

People v. Roberts, 45 L. R. A. 126, N. Y.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT.

The above entitled cause being regularly on the March, 1917, Term calendar of the above named Court, came duly on for trial at Grand Forks, North Dakota, before the Hon. Chas. M. Cooley, Judge of said court, without a jury, on the 29th day of March, 1917, Geo. E. Wallace, Esq., and O. B. Burtness, Esq., appearing as counsel for the plaintiff, and Messrs. Brown & Guesmer, and Murphy & Toner, appearing as counsel for the defendant, and the court having heard and considered the evidence adduced at said trial, and the arguments of counsel, and being fully advised in the premises, makes and files herein the following:

FINDINGS OF FACT.

The Court finds:

I.

That the plaintiff during the times mentioned in the complaint, and herein, was and now is, a municipal corporation organized under the laws of the state of North Dakota.

II.

That the defendant during the times mentioned in the complaint and herein was and now is, a corporation organized under the laws of the state of North Dakota.

III.

That in neither or any of the years 1908, 1909, 1910, 1911, 1912, or 1913, was any property of the defendant assessed or attempted to be assessed for taxation, or taxed, in the state of North Dakota.

IV.

That in neither or any of the years 1908, 1909, 1910, 1911, 1912 or 1913, or 1914, did the defendant make out or cause to be made out any statement such as is required by Section 2110, Compiled Laws of 1913.

V.

That during the year 1914 there was placed on the assessment roll of the City Assessor of the City of Grand Forks, under the classification of "Bonds and Stocks" pretended assessments against the defendant in the amount of \$50,000.00 for each of the years 1908, 1909, 1910, 1911, 1912, and 1913; that each and all of pretended assessments for said years, so placed upon the assessment roll of the said City Assessor, were made by the Tax Commission of North Dakota, acting through the said City Assessor, and were directly made by said Tax Commission.

VI.

That during the year 1914, there was placed on the assessment roll of the City Assessor of the City of Grand Forks, under the classification of "Bonds and Stocks," a pretended assessment against the defendant in the amount of \$50,000.00 as for the year 1914.

VII.

That when the matter of said pretended assessments for the years 1908 to 1914, both inclusive, so appearing on the assessment roll of said City Assessor came before the Board of Equalization of the city of Grand Forks, defendant filed with said Board objections and protests to each and all of said pretended assessments which objections and protests were overruled.

VIII.

That during the year 1914, and subsequent to the time when said pretended assessments for the years 1908 to 1914, both

inclusive, had been placed on the assessment roll of the said City Assessor, there was placed in the County Auditor's book or assessment roll of property which had escaped taxation, pretended assessments against defendant, under the classification "Bonds and Stocks" in the amount of \$50,000.00 for each of the years 1908 to 1913, both inclusive, and on account of the same alleged property that had been previously attempted to be assessed for the same amounts and for the same years on the assessment roll of said City Assessor.

IX.

That at the time when said pretended assessments were so placed in said County Auditor's book or assessment roll of property which had escaped taxation, said pretended assessments so appearing on the assessment roll of said City Assessor had not been set aside by the judgment of any court, and the alleged property which was attempted to be assessed by said pretended assessments so placed in said County Auditor's book or assessment roll had not then been omitted in the assessment of any previous year or years.

X.

That each and all of said pretended assessments for the years 1908 to 1913, both inclusive, so placed in said County Auditor's book or assessment roll of property which had escaped taxation were made by the tax commission of North Dakota acting through said County Auditor, and were directly made by said Tax Commission.

XI.

That when the matter of said pretended assessments for the years 1908 to 1914, both inclusive, so appearing on the assessment roll of the said County Assessor, and the matter of said pretended assessments for the years 1908 to 1913, both inclusive, so appearing in said County Auditor's book or assessment roll of property which had escaped taxation, came before the Board of Review and Equalization of the county of Grand Forks, defendant filed with said Board objections and protests to each and all of said pretended assessments, which objections and protests were overruled.

XII.

That thereafter, pretended taxes on account of said pretended assessments so made in 1914, were extended against defendant on the tax lists of the county of Grand Forks, as follows:

For the year 1908 the sum of \$3094.00
 For the year 1909 the sum of 3045.00
 For the year 1910 the sum of 2795.00
 For the year 1911 the sum of 3980.00
 For the year 1912 the sum of 3094.00

For the year 1913 the sum of 3155.00

For the year 1914 the sum of 3180.00

XIII.

That the defendant's business during all of the times mentioned in the complaint, and herein, and during all of the years 1908 to 1914, both inclusive, was, and now is, the manufacture and sale of a breakfast food known as "Cream of Wheat;" that prior to 1908 the defendant duly complied with the laws of the State of Minnesota relating to foreign corporations and obtained a license to transact business in the State of Minnesota; that prior to 1908, defendant established, and has since continuously maintained and operated a factory for the manufacture of, and sales office for the sale of, said product known as "Cream of Wheat" in the city of Minneapolis, Hennepin county, Minnesota; that at all times during the years 1908 to 1914, both inclusive, defendant maintained no factory or sales office other than the factory and sales office aforesaid; that at all times during said years all orders for defendant's said product, "Cream of Wheat," were received by and filled through said Minneapolis factory and sales office of the defendant, and that for convenience and economy in distribution, defendant, to fill orders, stored considerable quantities of said product in various cities of the United States; that during all of said years all books of account of said defendant were kept at said Minneapolis office of defendant, and all remittances and payments of money to defendant were made to and received by said defendant at its said Minneapolis office.

XIV.

That at no time during the years 1908 to 1914, both inclusive, did the defendant own or have, and at no time since said years has defendant owned or had any real estate or property of any kind within the state of North Dakota, or any money on deposit there; that during the said years 1908 to 1914, both inclusive, the defendant maintained an office at the First National Bank, of Grand Forks, but that at no time during any of said years did defendant transact, and that at no time since said years has defendant transacted, any business of any kind at said office at the said First National Bank, of Grand Forks, or at any other place in North Dakota, except that the defendant's corporate meetings were held at said office at the said First National Bank of Grand Forks; that for said office so maintained by defendant at said First National Bank of Grand Forks, there was used, during all of said times, merely a portion of the ordinary banking quarters of said Bank, and that all fixtures and property of every kind in and about said office at said First National Bank of Grand Forks were, during all of said times, owned by said bank, and that during all of said

times defendant used said portion of said banking quarters as such office merely as a favor from said bank.

XV.

That during all the times mentioned in the complaint, and herein, and during all the years from 1908 to 1914, both inclusive, the defendant had and owned extensive real estate holdings in the state of Minnesota, and a large amount of personal property which was permanently located at said factory in Minneapolis, Minnesota, and at other places beyond the borders of the state of North Dakota, and that during all of said times all of defendant's property of every kind and description was permanently located beyond the borders of the state of North Dakota, and all of defendant's business of every kind and nature, excepting the mere holding of corporate meetings, was transacted beyond the borders of the State of North Dakota.

XVI.

That defendant was assessed and paid taxes for all the years 1908 to 1914, both inclusive, upon all its real estate and personal property in the state of Minnesota, and other states where its said property located and its said business carried on.

XVII.

That at no time during any of the years 1908 to 1914, both inclusive, did defendant own any bonds or stocks of any kind, or any special franchise.

XVIII.

That each and all of the pretended assessments and taxes involved in this action were attempted to be assessed and imposed upon defendant solely under the provisions of Section 2110, Compiled Laws of North Dakota, for 1913, and upon defendant's own capital stock on account of any alleged value of defendant's intangible property.

XIX.

That in the case of each and all of the pretended assessments and taxes involved in the present action, there was not made out by any of the assessing and taxing officials any statement as provided for by Section 2110, Compiled Laws of North Dakota for 1913, nor did any of the assessing and taxing officials in the case of any of said pretended assessments and taxes make any computations or calculations as to the various items and amounts which are required to be set forth in the statement provided for by said Section 2110.

XX.

That no part of the taxes mentioned in Finding XII hereof has been paid.

XXI.

That on or about the first day of February, 1916, the Board of County Commissioners of said Grand Forks county, passed and adopted a resolution, as follows:

Whereas, personal property of the Cream of Wheat Company, a corporation has been duly assessed for the years 1908, 1909, 1910, 1911, 1912 and 1913, and 1914, and

Whereas, the said Cream of Wheat Company, a corporation has failed and neglected to pay said taxes for said years; and Whereas, there is now due and owing to the county of Grand Forks for such taxes levied and assessed for the year 1908 the sum of \$3,094.00, together with accrued interest and penalty thereon; for the year ~~1909~~ ¹⁹⁰⁹ the sum of ~~\$2,985.00~~ ^{\$3,095.00}, together with accrued interest and penalty thereon; for the year 1910, the sum of \$2,795.00, together with accrued interest and penalty thereon; for the year 1911 the sum of ~~\$3,095.00~~ ^{\$3,095.00}, together with accrued interest and penalty thereon; for the year 1912, the sum of \$3,094.00, together with accrued interest and penalty thereon; for the year 1913, the sum of \$3,155.00, together with accrued interest and penalty thereon, and for the year 1914, the sum of \$3,180.00, together with accrued interest and penalty thereon; and, Whereas, all of such personal property taxes are now delinquent; and, Whereas, the said Cream of Wheat Co., a corporation, does not seem to have tangible property within the state of North Dakota subject to distress and sale, and that it is therefore deemed expedient by the Board of County Commissioners of Grand Forks county to collect such delinquent taxes by action.

Now, Therefore, Be it Resolved: That an action be instituted in the name of Grand Forks county for and on behalf of said county for the collection of all of the aforesaid delinquent personal property taxes, together with all penalty and interest thereon that will accrue up to the time of the determination of said action, and that the State's Attorney of this county be hereby authorized to commence such action or actions as he may deem fit for the collection of such taxes in the name and on behalf of said county."

XXII.

That at none of the times in said complaint and herein mentioned has the defendant had any tangible property located within the state of North Dakota.

XXIII.

That the articles of incorporation of the defendant designate the city of Grand Forks as the principal place of said corporation.

XXIV.

That the Assessment Book of the City Assessor of the city of Grand Forks which contained such pretended assessments for the years 1908 to 1914, both inclusive, so appearing on the assessment roll of the City Assessor of the said city of Grand Forks, was duly verified.

From the foregoing Findings of Fact the Court now makes and files the following:

CONCLUSIONS OF LAW.

I.

That at no time during any of the period from 1908 to 1914, both inclusive, did the defendant have, nor has it at any time since had, any property of any kind, nature, or description, subject to assessment and taxation within the state of North Dakota.

II.

That each and all of the pretended assessments and taxes involved in this action are illegal, null and void, and that defendant is entitled to judgment declaring the same to be illegal, null and void, and directing that the same be stricken and cancelled from the records of the city and county of Grand Forks; that plaintiff is not entitled to recover anything in this action, and that defendant is entitled to judgment against plaintiff for its costs and disbursements herein.

ORDER FOR JUDGMENT.

Let judgment be entered according to the foregoing Findings of Fact and Conclusions of Law.

Dated this 25th day of October, 1917.

By the Court,

CHAS. M. COOLEY,
Judge.

- (2) DECISION OF NORTH DAKOTA SUPREME COURT, INCLUDING DISSENTING OPINION OF JUSTICE ROBINSON, REPORTED IN 170 NORTHWESTERN REPORTER 863.

Christianson, J. This is an action by the county of Grand Forks to recover from the defendant certain alleged delinquent personal property taxes for the years 1908 to 1914, both inclusive. The complaint alleges that the defendant is, and at all times herein mentioned, was a corporation organized under the laws of the state of North Dakota, with its principal place of business at the city of Grand Forks, in said Grand Forks county. And that in the year 1914, the county auditor under the direction of the State Tax Commission duly assessed certain property situated in said city of Grand Forks, to-wit: "bonds

and stocks" for the years 1908, 1909, 1910, 1911, 1912 and 1913, as property having escaped taxation; that such property, during each of said years, had been the property of the defendant and had not been assessed; that such assessment was thereafter equalized by the board of equalization of the county and later by the state board of equalization; that such taxes were duly entered by the county auditor and by him extended upon the tax lists of said county against the personal property of the defendant for each of said years at the same rate and for all the purposes for which taxes were levied upon property in said Grand Forks county in each of said years. It is further alleged that such personal property was duly assessed by the city assessor in the year 1914, and such assessment duly reviewed and equalized as provided by law. The complaint, also, shows that the action was brought pursuant to a resolution of the county commissioners directing its institution.

The defendant in its answer admits that certain assessments as alleged in the complaint were attempted to be made, but it denies the validity thereof and sets up various defects and irregularities in the proceedings culminating in the assessments for the respective years. It also avers that during none of the years did it own or possess any property whatsoever, subject to taxation in the State of North Dakota. In that connection it is alleged that the defendant's business during all of said time consisted in the manufacture and sale of a breakfast food, commonly known as "Cream of Wheat." And that prior to 1908, it duly complied with the laws of the State of Minnesota, relating to foreign corporations and obtained a license to do business in said state, and that since 1908 and prior thereto, the defendant has continuously maintained its factory and sales office in the City of Minneapolis, in the State of Minnesota, and has maintained no factory or sales office at any other place; and that it at no time during the years in question had or owned any real or personal property subject to taxation in the State of North Dakota. The case was tried to the court without a jury. The trial court resolved all questions raised with respect to the defects and irregularities in the various assessments in favor of the plaintiff, but ordered judgment in favor of the defendant for a dismissal of the action, for the reason that it had no property subject to taxation within the State of North Dakota. The plaintiff has appealed from the judgment, and asks for a review of certain specified questions of fact.

The controlling facts in this case are not in dispute. The defendant is a corporation organized under the laws of the State of North Dakota. It was organized for the purpose, and its business consists, of manufacturing and marketing a cereal

known as "Cream of Wheat." It has an authorized capital stock of \$50,000.00. The City of Grand Forks was designated in the articles of incorporation as its principal place of business. The defendant has qualified under the laws of Minnesota relating to foreign corporations, and obtained a license to transact business in such state and has established and maintains its factory and sales office in the City of Minneapolis, in the State of Minnesota. The tangible property of the defendant, both real and personal, situated in Minnesota, and other states was assessed during the years in question, and the defendant paid the taxes assessed. The defendant has during all of the time maintained its existence as a corporation organized under the laws of this state, and has kept and maintained continuously a public office in the City of Grand Forks in this state for the transaction of its usual and corporate business.

The trial court found and the plaintiff admits that the assessments involved in this litigation were made under Section 2110, Compiled Laws, 1913, which provides: "The president, secretary or principal accounting officer of any company or association, whether incorporated or unincorporated except banking corporations whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

1. The name and location of the company and association.
2. The amount of capital stock authorized and the number of shares into which said capital stock is divided.
3. The amount of capital stock paid up.
4. The market value, or if they have no market value, then the actual value of the shares of the stock.
5. The total amount of all indebtedness except the indebtedness of current expenses, excluding from such expenses the amount paid for purchase or improvement of property.
6. The value of all real property, if any.
7. The value of its personal property.

The aggregate amount of the fifth, sixth and seventh items shall be deducted from the total amount of the fourth, and the remainder, if any, shall be listed as 'bonds and stocks,' under subdivision 3 of Section 2103. The real and personal property of each company or association shall be listed and assessed the same as other real and personal property. In all cases of failure or refusal of any person, officers, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain." Section 2103, referred to in Section 2110, *supra*, relates to the valuation by the assessor of personal property listed for taxation, and enumerates 27

items or classes of property to be listed and valued.

Among the items enumerated are bonds and shares of capital stock of companies and associations.

The preceding section—Section 2102—provides that “every person required by this chapter to list property shall, when called upon by the assessor, make out and deliver to the assessor a statement verified by oath, of all the personal property in his possession or under his control, * * * ; but no person shall be required to include in his statement any share or portion of the capital stock or property of any company or corporation which such company or corporation is required to list or return as its capital or property for taxation in this state.”

It is undisputed that the defendant has not paid any tax whatever upon its corporate stock, or at all, in this state during the years in question. And there is no contention that the element of value of intangible property enumerated as taxable under Section 2110, *supra*, has been assessed in any other state. Neither is there any contention nor did the defendant make any showing upon the trial, that the assessments made against it in this state for the years in question in any manner exceeded the amounts which should have been assessed against it under the rule prescribed by Section 2110 *supra*. The defendant however, asserts that inasmuch as all of its tangible property is located beyond the borders of North Dakota, the intangible property owned by it is not subject to taxation in North Dakota; and that the defendant cannot be subjected to taxation under Section 2110 *supra*, without violating the rights guaranteed to it by Section 9, Article 1, of the Federal Constitution, and Section 1 of the 14th Amendment, and Sections 13 and 16 of the North Dakota Constitution.

In our opinion defendant's contentions cannot be sustained. The provisions of our state constitution recognize all property, as taxable, except that specifically exempted. (Const. N. D. Sections 174-176). The legislature is directed to exempt certain classes of property from taxation, but until it has acted such property is subject to taxation for this provision in the constitution is not self-executing. (*Engstad v. Grand Forks County*, 10 N. D. 54). Section 2110 was adopted as a part of Chapter 126, Laws 1897. The avowed purpose of that statute was to provide for a general system of taxation. It provided that “all property subject to taxation shall be listed and assessed every year, at its value.” (Section 2093, Compiled Laws, 1913). It also provided that “the capital stock and franchise * * * of corporations * * * shall be listed in the county, town or district where the principal office or place of business of such corporation * * * is located in this

state." (Section 2095, Compiled Laws, 1913). The specific purpose of Section 2110 was to prescribe the rule to be applied in the taxation of such companies or corporations domiciled in this state, as were not provided for by other provisions of law. The essential features of the section under consideration were adopted from Minnesota. In considering its purpose and effect the Supreme Court of Minnesota, speaking through Judge Mitchell, said: "Without stopping to discuss at length the whole scheme of taxation provided in our tax laws, an analysis and comparison of its various provisions satisfy us that the legislature intended Section 1530, Gen. St. 1894, to be the exclusive method of listing and taxing the property of all corporations and companies falling within the purview of that section. That section nowhere provides for the listing and taxation of corporate franchises as such, as a separate and distinct item of personal property. The method there provided for is the very common and most equitable and efficient one—of reaching the franchises and other intangible property for purposes of taxation through the capital stock. The 'Capital Stock' (using the term in the sense in which it is evidently used in this section) is as has been said, 'a business photograph of all the corporate possessions and possibilities,' and represents its business opportunities and capacities as well as its tangible assets. They enter into, and go to make up, the value of the stock. It is well settled that these franchises, although neither visible nor tangible are property which may be taxed the same as any other property. Hence a very common method of taxing corporations and stock companies is to list and assess all their tangible property, real and personal, the same as the like property of other persons is listed and assessed, and also, list and assess the capital stock at its actual or market value, less the value of its tangible real and personal property otherwise specifically listed and assessed. This system reaches every element of property value owned by the corporation, and at the same time avoids double taxation." (*State v. Duluth Gas & Water Co.* N. W. 78, 1032-1033).

That such intangible property may be subjected to a property tax has been held by the highest court in the land. In the *Adams Express Company* case (166 U. S. 185, 219-225; 41 L. Ed. 965, 977-979), the United States Supreme Court, speaking through Mr. Justice Brewer, said: "In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from taxing at its real value such intangible property. * * * To ignore this intangible property, or to hold that it is not subject to taxation at its accepted

value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country, * * * To say that there can be no such intangible property, that it is something of value, is to insult the common intelligence of every man. * * * Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for the purpose of taxation. * * * Substance of right demands that whatever be the real value of any property, that value may be accepted by the state for the purpose of taxation, and this ought not to be evaded by any mere confusion of words, * * * The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dream-land. They buy and pay for that which is of value in its power to produce income, or for purposes of sale."

While a tax assessed under Section 2110, *supra*, is in form a property tax, it is intended to reach, among other things the primary corporate franchise granted to it by the state, and as to that it is in substance or effect, to some degree at least, a tax upon the privilege of being a corporation. We do not however deem it necessary to enter into any discussion with regard to the name by which the tax is or ought to be designated. The question is one as to power of the legislature to provide for the imposition of the tax under the conditions prescribed, rather than the method selected. For "if the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction." (*Kansas City, etc. Co. v. Botkin*, 240 U. S. 226, 233. 60 L. Ed. 617, 619.)

Section 2110 was part of the laws of this state at the time the defendant corporation was organized, and its charter issued. The section has remained a part of our laws since its adoption. The defendant applied for and received its charter with knowledge of its provisions. It knew that a general corporation organized under the laws of this state was subjected to a tax upon its intangibles—including the privilege granted to it by the state of being a corporation—as prescribed by said section. "Undoubtedly," said Mr. Justice Hughes, speaking for the United States Supreme Court, (*Hawley v. Malden*, 232 U. S. 112, 56 L. Ed. 477, 482), "the state in which a corporation is organized may provide, in creating it, for the taxation in that state of all its shares whether owned by residents or non-residents. *Corry v. Baltimore*, 196 U. S. 466, 49 L. Ed. 556, 25

Sup. Ct. Rep. 297. This is by virtue of the authority of the creating state to determine the basis of organization and the liabilities of shareholders. Id. pp. 476, 477; *Hamis Distilling Co. v. Baltimore*, 216 U. S. 285, 293, 294, 54 L. Ed. 482, 485, 486, 30 Sup. Ct. Rep. 326. So, by reason of its dominant power to provide for the organization and conduct of national banks, Congress has fixed the places at which alone shares in those institutions may be taxed." See, also, 37 Cyc. 961.

Defendant places great reliance upon the decision of the United States Supreme Court in *Delaware, etc. Ry. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077, and contends that under the rule announced therein the taxation of defendant under the provisions of Section 2110, supra, constitutes a taking of its property without due process of law. The situation presented in the case cited was radically different from that presented in the case at bar. In the case cited there was included in the valuation of the property sought to be assessed in Pennsylvania the value of tangible property located permanently outside of that state. So the effect of the assessment was to compel the railroad company to pay taxes in Pennsylvania upon tangible property located beyond the borders of that state. But that condition cannot possibly occur under Section 2110, supra. That section specifically provides that the value of all real and personal property of the corporation shall be deducted from the value of the capital stock. Hence, the very situation which the court held to be fatal to the tax in the Delaware case is guarded against by the express provisions of the statute under consideration. In this connection it should be noticed that the Supreme Court of the United States has expressly said that the Delaware Railroad Company case is not applicable to a tax on intangible personal property, or even to a tax on tangible personal property, which has not acquired an actual situs. In speaking of the Delaware Railroad case and certain other decisions cited by the defendant in this case, in *Hawley v. Malden*, 232 U. S. 1, 11, 58 L. Ed. 477, 482, the Court said: "But these decisions did not involve the question of the taxation of intangible personal property; nor do they apply to tangible personal property which, although physically outside the state of the owner's domicile, has not acquired an actual situs elsewhere. *Southern P. Co. v. Kentucky*, 222 U. S. 63, 68, 56 L. Ed. 96, 98. When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation." In the *Southern Pacific* case, the Court said: "To say that the protection which the corporation receives from the state of its origin and domicile affords no

basis for imposing taxes upon tangibles which have not acquired an actual situs under some other jurisdiction is not supportable upon grounds of either abstract justice or concrete law." (222 U. S. 76, 56 L. Ed. 101).

It should be remembered that we are not dealing with a corporation organized to carry on a business of itself interstate commerce, and whose property, while situated in several states, in reality forms but one unit. (But even as to this class of corporations the United States Supreme Court has held that where one of such corporations voluntarily invokes the laws of a state and receives a grant of corporate existence, it cannot subsequently complain of the mode in which a tax, imposed upon it in accordance with the laws in force at the time it applied for and received its franchise is measured. *Kansas City, etc. Ry Co. v. Stiles*, 242 U. S. 11, 61 L. Ed. 176). But in the case at bar, we are dealing with a corporation organized for a purpose not of itself interstate commerce. We are dealing with an artificial being which was created, and now exists and exercises its powers, by virtue of the laws of this state, and which by the very law of its creation became a citizen of this state (222 U. S. 76), and from the inherent law of its nature cannot emigrate and become a citizen elsewhere. (222 U. S. 71). The nature and purpose of defendant's business is discussed in *Great Atlantic & Pacific Co. v. Cream of Wheat Co.*, 224 Fed. 566. From what is there stated it is evident that the value of defendant's corporate stock depends largely upon its intangible property. It is a matter of common knowledge that the corporate stock in the defendant company is quite valuable. As already stated there is no contention that the assessments made, in fact, exceed the amounts which would have been properly assessable against it during the years in question under the rule provided by Section 2110, supra. The defendant company appeared and filed protests against the assessments before the Boards of Equalization of the City of Grand Forks, and of the County of Grand Forks, but in neither of such protests did it attempt to show that the assessments were excessive under Section 2110. The defendant has taken the position throughout that it is not liable to taxation in this state, and that it is beyond the power of our taxing officials to make any assessment against it under said section, or at all.

The defendant, also, makes the point that the evidence shows that it had no bonds and stocks, and hence that an assessment for such property cannot be sustained. It is true the defendant had no stocks or bonds of other companies. But the legislature merely provided that the value of defendant's corporate stock as determined under Section 2110, should be inserted under this item in the assessment list. This is purely an administra-

tive matter, and within the sphere of legislative control. (See *Rogers v. Hennepin Co.*, 240 U. S. 184, 190, 60 L. Ed. 594, 598).

We are of the opinion that the defendant was subject to taxation in this state, and that the assessment of taxes against it under the rule prescribed by Section 2110 did not amount to a taking of its property without due process or deny to it the equal protection of the laws, neither did it infringe any other constitutional rights guaranteed to it by the constitutional provisions which it has invoked. If there is any constitutional objection to the rule prescribed by Section 2110, *supra*, it is that it operates as a discrimination in defendant's favor. (See *State v. Duluth Gas & Water Co.*, *supra*).

As already stated the trial court resolved all questions relating to the alleged defects and irregularities in the assessments in plaintiff's favor. The trial court so stated in a memorandum decision which it filed in the case. In its findings, however, the court found that the assessments for the years 1908 to 1913, both inclusive, were directly made by the Tax Commission. This finding we believe to be erroneous. While the evidence shows that the Tax Commission advised that the assessment be made it also shows that the assessments were in fact made and entered and reviewed by the officers whose duty it was to do so. It has not been shown that the assessments are in any manner fraudulent, or excessive.

It follows from what has been said that the judgment appealed from must be reversed, and judgment entered in favor of the plaintiff for the taxes involved herein. It is so ordered.

Grace, J: I concur in the result.

Robinson, J. (Dissenting). This is an action by the County of Grand Forks to recover from the defendant about \$30,000, back taxes for the years 1906 to 1914, inclusive, on property that escaped taxation in those years.

The complaint avers that in 1914, under the direction of the Tax Commissioners, the County Auditor of Grand Forks County duly assessed certain personal property situated in the City and County of Grand Forks, to-wit: Bonds and stocks, for said years, as property having escaped taxation; that all of such personal property was then and there and had during each of said years been the property of the defendant and had not been assessed or taxed during any of said years. That such assessment was duly equalized by the boards of equalization and duly entered and extended on the tax list of said county against the personal property of the defendant. That during the year 1914 the city assessor of Grand Forks duly assessed for that year certain personal property of the defendant, in the city of Grand Forks, to-wit: Stocks and Bonds, and the same was duly equal-

ized and taxes extended against the same to the amount of \$3,190; and that the County Commissioners duly passed a resolution to bring suit for the collection of such taxes.

The answer amounts to a general denial and it avers that in said several years the defendant had no property in the City or County of Grand Forks, and that during said years it did not own stocks or bonds of any kind.

On all points of law and fact the trial court found against the plaintiff, and it appeals to this Court.

The lengthy brief of counsel for plaintiff is swollen with needless citations and quotations from the courts of other states, and with points quite immaterial. For instance, it is contended that the tax in question is not really a property tax, as alleged in the complaint, but that it is a franchise tax, or a tax on the very existence of the corporation, because it is a corporation of this State,—and numerous authorities are cited to show that states may levy such a franchise tax. To all that the answer is that the complaint does not count on a corporate franchise tax, and such a tax is unknown to the laws of this state. To secure its corporate existence in accordance with the laws of the state, defendant paid to the State the requisite fee of \$50, and now it is contended that the state may tax its existence to the amount of three or four thousand dollars a year. But the State is not in that kind of business. The plaintiff brings this action to recover a judgment for the alleged taxes of seven years on personal property that escaped taxation. Of course, in such action, the plaintiff has the burden of proof. The plaintiff must show the existence of property within the taxing jurisdiction, an assessment of the property in the manner prescribed by law, a levy of the several taxes in pursuance of law. (Const. Sec. 175). Property must be assessed in the County, City, Township, Town, Village or District in which it is situated, in the manner prescribed by law. (Const. Sec. 179). The tax must be levied in pursuance of law on all property according to its value in money. (Const. Sec. 175, 176). The plaintiff has shown no compliance with these constitutional pre-requisites to a valid tax, and it has been shown beyond dispute that in said several years the defendant did not have property to the amount of \$50,000, or even \$1, within the taxing jurisdiction, and that it was not the owner of any stocks or bonds, either in Grand Forks County or elsewhere. The assessment is simply against "stocks and bonds," without any description of the same. If this refers to stocks or bonds of any party other than the defendant, the testimony shows that plaintiff never purchased or owned any such securities. If it refers to stocks and bonds issued and sold in the name of the defendant company, that is a liability and not an

asset. A company does not own the thing it sells. It may own blank forms of stock certificates, with authority to sell the same, but until a sale is actually made, the blank forms have no more force or effect than blank promissory notes. In a case of this kind, where a suit is brought to recover a judgment for taxes, the plaintiff must aver and prove facts sufficient to constitute a cause of action. In this case there is no such proof. There was no assessment; no property to assess; and there is no evidence showing the levy of any taxes. There is no occasion for a long story on or a speculative discussion of things which may have been. That which does not appear to exist is to be regarded as if it did not exist. (Sec. 7264).

The first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the

APR 16 1920

JAMES D. WAHER;
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 302.

CREAM OF WHEAT COMPANY, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF GRAND FORKS, IN THE STATE
OF NORTH DAKOTA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

WILLIAM LANGER,

Attorney General;

ALBERT E. SHEETS, JR.,

Assistant Attorney General,

Attorneys for Defendant in Error.

GEORGE E. WALLACE,

Of Counsel.

(26,950)



INDEX.

	Page.
1. Statement of the case.....	1
2. Character of tax.....	4
3. Taxing jurisdiction of State over domestic corporations....	8
4. As a tax upon a species of intangible property, it is within the jurisdiction of the State.....	10
(a) Distinguishing Adams Express Company vs. State Auditor	14
5. Section 2110, Compiled Laws of North Dakota for 1913, provides the usual method of taxing the shares in the ag- gregate of domestic corporations.....	17
(a) Cases distinguished.....	25
6. State of Arkansas ex rel. Attorney General vs. Bodcaw Lumber Company, 128 Ark., 505; 194 S. W., 692.....	28
7. Conclusion	39

APPENDIX.

(1) Section 176 of the constitution of North Dakota.....	41
(2) Section 2077, Compiled Laws of North Dakota for 1913..	41
(3) Section 2102, Compiled Laws of North Dakota for 1913..	42
(4) Section 2094, Compiled Laws of North Dakota for 1913..	43
(5) Section 2103, Compiled Laws of North Dakota for 1913..	44
(6) Section 2110, Compiled Laws of North Dakota for 1913..	47
(7) Section 4505, Compiled Laws of North Dakota for 1913..	48

LIST OF AUTHORITIES CITED.

	Page.
Adams Express Company vs. State Auditor, 165 U. S., 194; 41 L. Ed., 683.....	14
Cooley on Taxation, Vol. 1, 3d Ed., 402, 676, 677.....	5
Cooley on Taxation, Vol. 1, 3d Ed., 26, 27.....	9
Commissioners of Durham County vs. Blackwell Durham To- bacco Company, 116 N. C., 441; 21 S. E., 423.....	19, 22
Corry vs. Baltimore, 196 U. S., 466.....	17
Delaware R. R. Co. vs. Pennsylvania, 198 U. S., 341.....	9
Delaware R. R. Tax Case, 85 U. S.; 18 Wall., 206, 231.....	7
Flash vs. Conn., 100 U. S., 371.....	18
Fargo vs. Hart, 193 U. S., 49.....	16
Great Atlantic Tea Co. vs. Cream of Wheat Co., 224 Fed., 506, and 227 Fed., 46.....	13
Gray on Limitations of Taxing Power and Public Indebted- ness, section 101.....	11
Gray on Limitations of Taxing Power and Public Indebted- ness, section 48.....	8
Harvester Building Co. vs. Hartley, 98 Kan., 782; 99 Kan., 73; 160 Pac. Rep., 971.....	20
Hawley vs. Malden, 232 U. S., 1.....	12
Judson on Taxation, section 403.....	9
Kansas City, F. S. & M. Ry. Co. vs. Botkin, 240 U. S., 226, 233; 36 Sup. Ct., 261, 262; 60 L. Ed., 617, 619.....	5
Kansas City, F. S. & M. Ry. Co. vs. Stiles, 242 U. S., 111.....	5
Oswego Star & Factory Co. vs. Dolloway et al., 21 N. Y., 449, 453.....	14
Platt vs. Wilmot, 193 U. S., 602, 612.....	18
Rogers vs. Hennepin Co., 240 U. S., 184; 60 L. Ed., 594.....	7, 12
So. Pacific Ry. Co. vs. Kentucky, 222 U. S., 63.....	9
State vs. Duluth Gas and Water Co., 76 Minn., 96.....	3, 11
State of North Dakota vs. Cream of Wheat Co., 17 N. W., 865.	5
State Tax on Foreign Held Bonds, 15 Wall., 300.....	10
State of Arkansas ex rel. Attorney General vs. Bodcaw Lumber Co., 128 Ark., 505; 194 S. W., 692.....	28
Whitman vs. Oxford National Bank, 176 U. S., 559.....	18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 302.

CREAM OF WHEAT COMPANY, PLAINTIFF IN ERROR,

vs.

**THE COUNTY OF GRAND FORKS, IN THE STATE
OF NORTH DAKOTA, DEFENDANT IN ERROR.**

IN ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

(1) Statement of Case.

This case involves the validity of a judgment for taxes. As the matter is before this court, there is no question of tax procedure or of fact presented. The objection is not that the plaintiff in error has been over-assessed or taxed according to some procedure not conformable to due process. The objection is that it cannot be assessed at all. The question is wholly one of the legality of the exercise of the taxing jurisdiction of the State of North Dakota over the Cream

of Wheat Company, 'a domestic corporation of that State. This question depends upon the construction and application of several provisions of the revenue laws of North Dakota. (In our references to any revenue laws which have been changed, we shall state them as they existed at the time the taxes in question were assessed and levied, and all of the North Dakota statutes referred to will be found set out in full in the appendix of this brief.)

Section 176 of the Constitution of North Dakota required that all property be taxed by uniform rule. Under section 2077, Compiled Laws of 1913, stock of corporations is defined as personal property for purposes of taxation.

Section 2102, Compiled Laws of 1913, relieves any person from including in his assessment any shares of stock held by him in corporations to list their property for taxation. This statute is similar to those found in nearly all States where the tax laws treat the corporations as an entity apart from the shareholders.

Section 2094, Compiled Laws of 1913, subdivision 7, makes it the duty of the president, agent or officer of a corporation to list its personal property; and section 2103, Compiled Laws of 1913, prescribes a listing schedule or blank under which the various classes of personal property are to be listed and assessed. Section 2110, Compiled Laws of 1913, which is the statute under which the assessment in the case in hand was made, requires an additional statement from the president, secretary or principal accounting officer of any company or association, whether incorporated or unincorporated," showing the following:

- (1) The name and location of the company.
- (2) The amount of capital stock authorized and the number of shares.
- (3) The amount of capital stock paid up.

(4) The market value or, in the absence of a market value, the actual value of the shares of stock.

(5) The amount of indebtedness, except for current expenses.

(6) The value of all real property.

(7) The value of its personal property.

It also prescribes the rule for ascertaining a valuation to be listed as "Stocks and Bonds." (See subdivision 21, section 2103, Compiled Laws of 1913.) This valuation is arrived at by subtracting the fifth, sixth, and seventh items from the fourth item.

This statute was borrowed from Minnesota, in which State it was held to be unconstitutional (*State vs. Duluth Gas & Water Co.*, 76 Minn., 96), in that it prescribed too favorable a rule for the corporation. The opinion is written by Mr. Justice Mitchell and is an able one. It is pointed out in the opinion, that, in applying the rule laid down, the corporation would twice get the benefit of its indebtedness in arriving at the valuation of its "bonds or stocks;" once in determining the market or actual value of the shares of stock, and again when the specific deduction is made. This is contrary to the provisions of State constitutions which require the taxing of all property by uniform rule. (Section 176, constitution of North Dakota.) It was further held in the Minnesota case, however, that the statute was workable, disregarding the unconstitutional direction for the double deduction of indebtedness, and that an assessment might be made thereunder.

The above presents the sole point of the discussion in the reports of the North Dakota Tax Commission, which the plaintiff in error has reproduced in the brief, and we deem it unnecessary to make any further reference to the validity of the statute (section 2110), since it is invalid only to the extent that it is too favorable to the plaintiff in error.

The plaintiff in error is a domestic corporation with its home office in the city of Grand Forks, North Dakota. Its principal place of business outside of North Dakota is in Minneapolis, where some of its tangible property is located. Its principal office is in the State of its domicile. All of the laws heretofore mentioned were in force at the time of the incorporation of the plaintiff in error and during all the years in which the taxes complained of were levied. The laws requiring construction in this case do not differ essentially from similar ones embraced in the statutes of Alabama, Arkansas, California, Illinois, Iowa, Indiana, Kentucky, Kansas, Mississippi, Massachusetts, North Carolina, etc. For that reason the question here presented is important beyond the amount of the judgment in the case itself.

(2) Character of Tax.

The plaintiff in error seeks to maintain two propositions which it claims operate to render the judgment of the State court invalid. The first is that the tax is a property tax rather than a franchise tax; and the second, that, being a tax upon the intangible property of the company, it has no situs within the State of North Dakota where the corporation is chartered.

We do not deem the designation of the tax of particular importance; that is, as to whether it be denominated a property tax, or a franchise tax, and are content to treat it for what it really is, a tax upon the value attaching to the whole of the stock of the corporation which may be appropriately listed by it as the statute directs under the designation "Stocks and Bonds." It is our contention that the tax, however designated, is one falling within the taxing jurisdiction of the State.

A tax is not to be condemned merely because it might, in loose parlance, be unhappily or erroneously designated. We think the true principle applicable, so far as nomen-

ature is concerned, is that stated by the Supreme Court of North Dakota in the case in hand for which it relied upon the authority of this court, *Kansas City, F. S. & M. Ry. Co. vs. Botkin*. Said the supreme court of the State (quoting from opinion in this case at 170 N. W., 865):

"The question is one as to power of the legislature to provide for the imposition of the tax under the conditions prescribed, rather than the method selected. For, 'if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction.' *Kansas City, etc., Ry. Co. vs. Botkin*, 240 U. S., 226, 233; 36 Sup. Ct., 261, 262; 60 L. Ed., 617, 619."

The defendant in error does not contend that this is a franchise tax such as was involved in the case of *Kansas City, etc., Ry. Co. vs. Stiles*, 242 U. S., 111, where the statute provided a graduated schedule applicable to the paid capital stock of all corporations, regardless of value. The valuations upon which the taxes in question were levied were subjected by law to the general tax levies for the respective current years. It may be interesting to note, however, that an authority of such distinction as Cooley refers to a tax of this very character as a tax upon the franchise. (1 Cooley on Taxation, 3d Ed., page 402.) He says:

"On the other hand a tax on the market value of the capital stock of a corporation, over and above the value of its real and tangible property, is not a duplicate taxation by reason of the tangible property being also taxed, but is a tax upon the franchise." (Citing, principally, *Massachusetts*.)

But see the same author on pages 676, 677, where he says:

"Where a tax is plainly imposed on the corporate privilege, it must be sustained, even though in effect

it duplicates the burden on the corporate body. But such taxes are often measured by a standard which suggests the question whether in fact they are not taxes on property, in which case they might not perhaps be admissible. A case in illustration is that of a percentage on the capital stock paid in; which in Massachusetts has been held to be not a property tax but a tax on the franchise. Such a tax may obviously be either the one thing or the other, and the phraseology of the statute under which it is laid may determine which it is in the particular case. So in the same State a tax on savings banks measured by their deposits has been held a franchise tax, and the same ruling has been had in Connecticut, in Maine, and in Vermont; while in New Hampshire the contrary has been held. So in Massachusetts a tax measured by the excess of the market value of all the corporate stock over and above the property otherwise taxable, and one measured by the whole value of the corporate shares, have been held to be, not taxes on property, but franchise taxes, and therefore a corporation so taxed was not entitled to a deduction in respect to such part of the capital stock as was invested in non-taxable securities. And in the same State a tax on insurance companies measured by the value of policies in force is held to be a franchise tax. In Connecticut a tax on a corporation measured by its cash capital has been held a franchise tax; but in a later case a tax measured by the market value of the capital stock and by the funded and floating indebtedness was adjudged a property tax, and the earlier cases were questioned."

Enough has been said to indicate that grave difficulty is sometimes experienced in distinguishing between a so-called franchise tax, an ordinary property tax and a capital-stock tax. In view of this difficulty it is not surprising that descriptive terms are frequently found to be loosely and even erroneously applied. Fortunately, we are not concerned in this case with names, nor need we examine minutely the tax in question with a view to ascertaining its true character.

For it has been held to be valid by the highest judicial authority of the State and must be taken therefore to have been authorized by the State constitution and laws. The judgment of the State court must be held to be right unless the State exceeded its jurisdiction in applying its tax laws to the plaintiff in error in the manner indicated on this record.

From the standpoint of any Federal question that may be involved in levying taxes on corporations, the form or character of the tax is not material. As was said in Delaware Railroad Tax Case, 85 U. S., 18 Wall., 206, 231:

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; *our only concern is with the validity of the tax*; all else lies beyond the domain of our jurisdiction." (Italics are ours.)

See also Rogers *vs.* Hennepin County, 240 U. S., 184; 60 L. Ed., 594.

The basic jurisdictional fact for which we contend is dependent upon the franchise *to be*, which the plaintiff in error enjoys by reason of the charter issued by the State of North Dakota. In brief, it is our contention that the name applied to the tax is immaterial, for its validity depends wholly upon whether, when being levied under the statutes heretofore referred to, the State had jurisdiction for the purpose.

(3) Taxing Jurisdiction of the State Over Domestic Corporations.

It is conceded that the Cream of Wheat Company is a domestic corporation of the State of North Dakota; that it maintains an office in the State where its annual meetings are held and where any other business it may desire to conduct may be transacted. For all purposes of legal domicile, therefore, the corporation is domiciled in the State of North Dakota. It cannot do business in other States without obtaining a license under the terms there exacted of foreign corporations, and it enjoys all the privileges and immunities of citizenship under the Federal Constitution, in so far as they pertain to corporations, by virtue of the charter it has received from its parent State. The power of a sovereign State to create a corporation has always been held to imply and embrace certain jurisdiction for tax purposes, and this jurisdiction may be exercised in a variety of ways. As is said in Gray on Limitations of Taxing Power and Public Indebtedness, section 48:

“Taxes which are laid in terms upon the ‘capital stock’ of corporations may be either taxes upon the tangible assets of the corporations, exclusive of franchises, or upon the property of the corporations, including their franchises regarded as property, or they may be privilege taxes, based upon the privilege of exercising the corporate franchise, and measured by the amount of capital stock, or otherwise. These distinctions are matters of statutory construction, and the language of various statutes, and the decisions of the courts, differ so much that any attempt to lay down general rules would be hopeless. All of these forms of taxation are within the constitutional power of the legislature.

“Perhaps, the most prevalent rule is that capital stock includes all the property of the corporation, and that a tax on capital stock is a tax on all the assets of the corporation, tangible and intangible.”

To the same effect see Judson on Taxation, section 403, where it is stated:

"Under the same principle of the right to tax all property which can be localized in the jurisdiction, a State may tax the capital stock of its domestic corporations, either directly to the corporation, or through the corporation to the individual shareholders, irrespective of their residence, whether in or out of the State, the stock having a *situs* for taxation at the domicile of the corporation." (Italics are ours.)

See also 1 Cooley on Taxation, 3d Ed., pages 26, 27. He says:

"But the State which grants corporate powers or consents to their being exercised within its limits when the corporate grant is by some other sovereignty, may annex to the grant or consent such terms in respect to taxation as it shall deem expedient; and it may, and sometimes does, provide that the shares of stockholders shall be taxed at the place of corporate business, and the tax be paid by the corporation for all of its members."

The principle that the domicile of the corporation itself affords the legal foundation for the exercise of the taxing jurisdiction is even carried far enough to justify taxes upon *tangible* property which has never been within the jurisdiction of the State, but which has not acquired an actual physical *situs* elsewhere. *Southern Pacific Ry. Co. vs. Kentucky*, 222 U. S., 63.

It is not, of course, contended that the State can levy a tax on the bonds or stocks of a corporation purely as a method of reaching tangible property lying beyond its jurisdiction and within another taxing jurisdiction. It was held in *Delaware Ry. Co. vs. Pennsylvania*, 198 U. S., 341, that this could not be done. The tax in question in no way trenches upon the authority of that decision. This tax is well within the broad jurisdiction of the State as asserted

by Mr. Justice Field in the case of *State Tax on Foreign Held Bonds*, 15 Wall., 300, wherein he said:

"The subjects of taxation are persons, property and business."

"* * * * * Whatsoever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufacture, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

"Corporations may be taxed, like natural persons, upon their property and business."

(4) As a tax upon a species of intangible property, it is within the jurisdiction of the State.

While the previous discussion necessarily embraces some consideration of the topic in hand, it is perhaps well to refer more specifically to the exact character of the property reached by the tax in question for the purpose of ascertaining its true legal situs.

It must be remembered in this case no question of valuation is raised. Considering, then, that the application of the statute in the instant case has resulted in listing a certain valuation as "bonds or stocks," this valuation will represent what in economics is termed "the corporate excess" or the value attaching to the capital stock of the corporation over and above the value of its ordinary real and personal

property, which will usually appear listed elsewhere in a tax-listed blank. (See *State vs. Duluth Gas & Water Co.*, 76 Minn., 96.) Let us take this value to represent a species of intangible property owned by the corporation and entered into the value of its stock. As we understand the contention of the plaintiff in error, it is that this intangible property must be localized for taxation where its tangible and other intangible property is located. It seems to be claimed that this value is due wholly to the presence of property and the transaction of business elsewhere.

This argument leaves out of consideration the fact that the ability of the corporation to transact business elsewhere is derived from the charter granted by the State of North Dakota. It also assumes that there is a direct connection between the ownership of property elsewhere and the intangible value thus reached. In addition, the argument is a negation of the prevailing rule with reference to the situs of this particular species of property of corporations for tax purposes. Considering the last objection to the argument first, since it refers to the authorities.

"The *situs*" says Gray on Limitations of Taxing Power and Public Indebtedness, section 101, "of intangible assets of corporations—their 'franchises' considered as property—is, in the absence of legislative direction to the contrary, at the home office of the corporation, and the State of domicile probably has power to tax the whole body of '*franchises*' or *intangible assets, good-will, and the like*, regardless of where the properties are situated, the use of which creates the value of the intangible assets." (Italics are ours.)

Reference to the note which Gray attaches to the section will readily disclose the source of the qualifying word "probably." It is apparently prompted by the decision of this court in the case of Delaware, etc., Ry. Co. *vs.* Pennsylvania, *supra*, where the court curbed an attempt by Pennsylvania

to tax tangible property lying beyond the jurisdiction of the State under the guise of a capital stock tax.

In a later decision, however, this court spoke quite pointedly on the situs of intangible value attaching to corporate stock, showing no disposition to depart from the prevailing rule. In *Hawley vs. Malden*, 232 U. S., 1, the court said (page 1):

"To support the contention that this familiar State action, hitherto assumed to be valid, is fundamentally violative of the Federal Constitution, the plaintiff in error invokes the doctrine that a State has no right to tax the property of its citizens when it is permanently located in another jurisdiction. *Louisville & Jeffersonville Ferry Co. vs. Kentucky*, 188 U. W., 385; *Del., Lack. & West. Ry. Co. vs. Penn.*, 198 U. S., 341; *Union Transit Co. vs. Ky.*, 199 U. S., 194. But these decisions did not involve the question of the taxation of intangible personal property (*Union Transit Co. vs. Ky.*, 199 U. S., 194, 211); nor do they apply to tangible personal property which, although physically outside the State of the owner's domicile, has not required an actual situs elsewhere. *Southern Pacific Ry. Co. vs. Kentucky*, 222 U. S., 63, 68. *When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation.*" (Italics are ours.)

The foregoing was subsequently relied upon by this court as authority for taxing non-residents of Minnesota upon the value of their memberships in the Chamber of Commerce in the city of Minneapolis, by analogy to the taxation of the shares of stock in domestic corporations. (*Rogers vs. Hennepin County*, 240 U. S., 184, 191.) This authority is deemed an adequate answer to the argument of the plaintiff in error. Brief reference, however, to the source of the value taxed may well suffice to demonstrate the soundness of the rule adhered to in the Malden case.

The value taxed, under the stated theory of the law, has no reference to the existence of any other property, tangible or intangible, either within or without the State of North Dakota. For illustrative purposes, we may use the Cream of Wheat Company as a type of corporation that would be affected by this law. And we may take the description of their business as it is found in an adjudicated case, *Great Atlantic Tea Co. vs. Cream of Wheat Co.*, 224 Fed., 566, and 227 Fed., 46, as sufficient for our purposes. It utilizes about 1 per cent of the total purified middlings which are a by-product of flour mills, and, without subjecting them to any process of treatment or doing anything to them, it puts them in packages and offers its selection to the wholesale trade under the name of "Cream of Wheat," upon which trade name it has a copyright. The value attaches to the trade name by reason of its broad advertising, and an acquired good will. Clearly, this is a value that is in no way dependent upon the existence of any tangible property owned by the company anywhere. Its stock would be worth just as much if it should dispose of all of its property, wherever situated, excepting its trade name, and should hire its commodity put in packages and distributed. To argue, then, that the value taxed is referable to the existence of other property owned by the company is to rely upon an arbitrary assumption that is as ill-founded in law as it is in the experience of the corporation itself.

The history of this company adds further refutation to the argument advanced in its behalf. It started business in North Dakota, utilizing the middlings from a small mill, and, as its trade name became known and its business expanded, it opened a business office in Minneapolis and changed the location of its selection and boxing establishment which it terms its factory. It seems to us absurd to say that in opening an office elsewhere and in acquiring some property outside the State, it moved its trade name also.

When the corporation obtained its license to do business

elsewhere and when it opened an office in Minneapolis, the State of North Dakota did not reverse its taxing policy. It did not tax any of the resident stockholders in this concern for the large value which attached to the stock as the business prospered (Section 2102, Compiled Laws of 1913). We are at a loss to understand by what legal principle it can be contended that the establishing of an office or the acquiring of property outside the State by a corporation can deprive the parent State of its taxing jurisdiction.

We should not lose sight of the fact that the corporation was chartered under the general incorporation act, which provides, among other things, that the articles must set forth "the place where its principal business is to be transacted." (Section 4504, subdivision 3, Compiled Laws of 1913.) Where this provision exists it is even held to be beyond the power of directors or trustees to change the taxing situs within the State without amending the articles of incorporation. *Oswego Starch Factory Co. vs. Dolloway et al.*, 21 N. Y., 449, 453.

(a) *Distinguishing Adams Express Co. vs. State Auditor.*

The plaintiff in error seems to place great reliance on the case of *Adams Express Company vs. State Auditor*, 165 U. S., 194; 41 L. Ed., 683. It was apparently held in that case that a State other than the State of domicile might reach the intangible value owned by a corporation by devising a scheme of apportionment based upon a combined ratio of total business done and property owned compared to local business and property. The law in question was one which attempted to reach the proportion of the entire capital employed in the State of Ohio. In so apportioning the capital, the entire property of the company was valued as a unit, and intangible values were so apportioned as to result in the State of Ohio taxing a value in excess of the worth of the tangible property within the State. It clearly appears in the opinion that the decision hinges upon the propriety of applying what the

court termed the unit rule to the particular class of business there under consideration. Said Chief Justice Fuller (pages 221-222) :

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph, and sleeping-car companies, to roadbed, rails and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business—whether represented in tangible or intangible property—in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others. We repeat that while the unity which exists may not be a physical unit, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, *but existing in the very necessities of the case—resulting from the very nature of the business.*" (Italics are ours.)

The difference between the railway, telegraph, sleeping-car or express businesses and the business of marketing a breakfast food under a widely advertised trade name are so numerous that it is to be wondered at that counsel would perceive an analogy. In fact, the court itself, in the Adams Express Company case, practically suggested the difference between an express business, when it came to valuing it as a unit, and such a business as that under consideration in this case. For in the paragraph immediately following that quoted above, the court instanced the same company owning both a manufacturing establishment and a store for the very purpose of establishing the distinction. It was said that in the latter case,

"The connection between the two is merely accidental and growing out of the unity of ownership.

But the property of an express company distributed through different States is *as an essential condition of business united in a single specific use*. It constitutes but a single plant, made so by the very character and necessities of the business." (*Italics are ours.*)

Furthermore, the very strong dissent of the present Chief Justice, concurred in by three of his associates, is in itself an evidence of the extreme ground taken by the majority of the court. This case is clearly not an authority for the proposition that the situs of the intangible property of a domestic corporation is established *exclusively* in States other than the State of domicile through the mere fact of the ownership of physical property beyond the State or the transaction of business elsewhere. It is one thing to say that a State other than the State of domicile may, in certain circumstances, such as the use of its physical property in carrying on a particular kind of business according to a method that is measurably uniform, acquire the right to tax certain intangible values belonging to foreign corporations; but quite another thing to say that the State of domicile may never tax intangible values where an ordinary business corporation of its own creation moves its physical property to another State, while continuing to exercise its original charter powers. Surely the Constitution of the United States does not thus invite corporations to play at a game of ducks and drakes with the sovereign States that are responsible for their being.

The distinction noted above between the Adams Express Company case and the case at bar finds further recognition in the case of *Fargo vs. Hart*, 193 U. S., 490, in which this court held that the unit rule recognized in the Adams Express Company case could not even be so applied to a non-resident express company as to create a situs for the purpose of reaching elements of tax value consisting of personal property not used in conjunction with the business. In that case it was bonds owned by the express company. The court said (page 501):

"The express business added nothing to the value of the bonds in New York. Conversely, the utmost extent to which those bonds entered into the value of property in Indiana was in so far as they helped to make the public believe that the express company could be trusted, and therefore increased its good will. That they made a part of the public more willing to buy interests in the company because they were an assurance against personal liability was no concern of Indiana. But it is obvious that, merely from the point of view that the express company could be trusted by the public with the carriage of goods or money, the good will could not be measured by the assets."

This is rather a recognition of the fact that such a value as that taxed in the instant case could not possibly be taxed in any other State, because no State, other than the State of domicile, would have a right to consider good will alone as an element of value for taxes.

(5) Section 2110, Compiled Laws of North Dakota for 1913, provides the usual method of taxing the shares in the aggregate of domestic corporations.

The preceding argument has pursued upon the theory that the plaintiff in error has misapprehended the law with respect to the situs of intangible property for the purpose of taxation. It is now our purpose to point out the usual application of similar statutes and their usual interpretation by other courts. In entering upon a consideration of those cases the elementary principle should be borne in mind that a tax upon a corporation or its property is not the legal equivalent of a tax upon the shares of stock in the aggregate. *Corry vs. Baltimore*, 196 U. S., 466, at page 476. In this case the court held that while the State may be without authority to impose a property tax upon the corporation without first deducting property owned by the corporation in a foreign juris-

diction, nevertheless, it has the power under the constitution to establish within its own jurisdiction the situs of the stock for the purpose of taxation, without regard to the location of the property of the corporation issuing the stock. To the same effect is *Flash vs. Conn.*, 109 U. S., 371; *Whitman vs. Oxford National Bank*, 176 U. S., 559; *Platt vs. Wilmot*, 193 U. S., 602, at 612.

In making their interpretation of section 2110, Compiled Laws of North Dakota for 1913, the courts have proceeded upon what may be termed the garnishment plan of taxing the shares of stock. It has been often stated that the so-called garnishment idea was borrowed from the Federal scheme, which authorizes the taxation of shares of stock in lieu of the assets of national banks at their source. This historical reference is incorrect, however, for the reason that similar plans were in operation in Iowa and Missouri, and several other States as early as 1858, while the Federal act creating national banks was not passed until June 3, 1864. Perhaps no better statement of this mode of taxation of the aggregate shares of stock at their source is found than that made by Mr. Justice White in *Corry vs. Baltimore*, *supra*, when he said:

"The principle upheld by the rulings of this court to which we have referred concerning the taxation by the State of stock in national banks, is that the sovereignty which creates a corporation has the incidental right to impose reasonable regulation concerning the ownership of stock therein, and that a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholders is not unreasonable regulation. Applying this principle, it follows that a regulation of that character prescribed by a State, in creating a corporation is not an exercise of the taxing power of the State over persons and things not subject to its jurisdiction."

It would serve no good purpose to quote additional authority either for illustration or to give added weight to the elementary principle, that the State may tax the shares in domestic corporations at their source. Upon this proposition there can be no dispute.

The North Dakota Legislature has provided in the latter portion of section 2102, Compiled Laws of North Dakota for 1913, a statute which exempts from taxation the shares of stock in the hands of the shareholders when such capital stock has been listed, and returned for the purpose of taxation by the corporation itself. Of a similar statute it was said by the North Carolina court in *Com'rs vs. Blackwell Durham Tobacco Co.*, 116 N. C., 441; 21 S. E., 423:

"The effect (of the exonerating statute) is merely to change the situs of the shares for taxation from the residence of the owner to the locality where the chief office of the corporation is situated, as held in *Wiley vs. Com'rs*, 111 N. C., 397. It simply extends to the collection of taxes due by shareholders in other corporations the mode of collection already in force as to shareholders in national banks." U. S. Rev. St., sec. 5219."

In the instant case section 2110, Compiled Laws of North Dakota for 1913, cited, provides for a tax upon the capital stock of a corporation. From the information required of the corporation in subdivisions 1, 2, 3, 4, 5, 6 and 7 thereof it is apparent that the tax is one upon the value of the shares of stock. It is upon the value of these shares of stock, in the aggregate, that the tax is levied, after other tangible property which is subject to the ordinary levies upon that class of property, is deducted. Without any ambiguity in its language or in the method of its application the sum total of the result accomplished by section 2110, Compiled Laws of North Dakota for 1913, is to impose a tax upon the shares of stock at their source. Such is the interpretation made of

similar statutes where they have come before the courts for construction.

In the case of *Harvester Building Company vs. Hartley*, 98 Kan., 732; 99 Kan., 73; 160 Pac. Rep., 971, decided in 1916, the statute in controversy exempted the listing by an individual of any of the capital stock of a corporation which the corporation itself was required to list. Of the corporation it required a listing and return of the capital stock at its true value in money, upon which total amount, after the real and personal property owned by the corporation had been deducted, the tax should be levied. It was contended that section 9229, General Statutes of Kansas, 1909, undertook to impose a tax upon the capital stock—that is, the property of the corporation—rather than upon the shares of stock owned by the shareholders. Refusing to accept this theory, the court, through Justice Mason, in the following language held the tax to be one upon the actual value of the capital stock of the corporation, or, in other words, upon its shares in the aggregate:

“The obvious purpose of the statute under consideration is, in effect, to require the corporation to list for taxation, and pay the taxes upon, the property which otherwise the shareholder would have to return and answer for. The law undertakes to reach the property of the individual through the organization. The result is ordinarily accomplished, as in the statute relating to the taxation of banks (Gen. Stat., 1909, §9298), by providing in so many words that the assessed value of any real estate shall be deducted from the original assessment of the capital stock; but the same general purpose is evident here. The section under consideration begins by exempting individuals from including in their lists of personal property any portion of the “capital stock” of a corporation. Clearly the quoted phrase is not used with technical accuracy, since the stockholder would in any event list only his own shares, and no part of the “capital stock” of the company. The term “stock” having been

used in the introductory clause in a somewhat colloquial sense, it is natural and proper to give it a like interpretation where it occurs later in the same sentence. In view of these considerations, we think the fair meaning of the statute is that the corporation shall determine the value of its stock (that is, of all the shares of stock issued and outstanding, which will necessarily be the value of its possessions and rights, including franchises and good will, in view of the use made of its property and the business it does, a value corresponding to its earning capacity), and deduct therefrom the assessed value of any specific property in the county which is separately listed, returning the difference as the additional amount for which it is taxable, subject to review by the proper officers. This method of applying the law is that used by the state tax commissioners, with the approval of the court, in *Gas Co. vs. Spaeth*, 83 Kan., 191; 109 Pac., 785."

For the purpose of explaining the difference in value between the capital stock and the value of the shares of stock, the court continues:

"Where the entire capital stock of a corporation has been invested in a piece of real estate, and it has no other business than renting that property, it would seem that the value of its stock in the sense indicated would be nearly or exactly the same as that of its realty. *The values, however, would not necessarily be precisely the same. The demand for shares of the corporate stock might be better than that for real estate, causing a difference in market value. The advantage incident to doing business as a corporation might enable the owner to realize an income from the property larger than could otherwise be obtained, or could be expected upon the basis of its mere market value. People's Warehouse Co. vs. Yazoo City, Miss., 500 South. 481, and cases there cited. (Italics are ours.)*

"No inequality or injustice results from the interpretation adopted. The holder of stock in the cor-

poration is the person ultimately interested in the matter. He ought in fairness to pay a tax in proportion to its actual value. The law in effect requires this, and nothing more. If the corporation puts a just estimate upon the value of his stock (with that of others), and he is required to pay (through the corporation) a tax based upon that amount, less the assessed value of property upon which the corporation is otherwise taxed, he can suffer no wrong thereby. If the physical property is over-valued, he is compensated by the consequent reduction in the tax on the stock; if the physical property is under-valued, no hardship ensues, since he gains thereby; what he loses in the increased stock assessment. Compensation is automatically provided, the net result being always the same."

On rehearing the distinction, for the purposes of taxation, between the capital stock of a corporation and the shares of the owners in the aggregate, was amplified and the opinion above reinforced with the following language:

"The court held in this case that the plaintiff corporation should pay taxes upon the actual value of its stock (that is, of its shares in the aggregate), although that exceeded the assessed value of a building which it owned, and the renting of which constituted its only business."

This same interpretation had been announced as early as 1895 by the Supreme Court of North Carolina in the case of Board of Commissioners of Durham County *vs.* Blackwell Durham Tobacco Company, 116 N. C., 441; 21 S. E., 423, already cited. In that case the act of 1893, chapter 296, section 39, provided that certain corporations, therein designated, in addition to other property required by the act to be listed, should pay a tax on their capital stock. The method of ascertaining the amount which should be taxed as capital stock is substantially the same as provided for by the North Dakota statute.

It was urged that the tax amounted to double taxation and was a direct levy upon the property of the corporation. In making its interpretation and distinguishing between the capital stock of the corporation and the shares of stock in the aggregate the court, speaking through Justice Clark, said:

" 'Especially is it important to distinguish a tax on shares of stock from a tax on the capital stock,' says 1 Cook, *supra* (sec. 563), citing Porter *vs.* Railroad Co., 76 Ill., 561, and numerous cases in note 2 to that section. In Belo *vs.* Commissioners, 82 N. C., on page 418, the same distinction is clearly laid down, and additional authorities given by Smith, C. J. Originally the tax upon the shares of stock was collected of the individual shareholders at their several places of residence. Buie *vs.* Commissioners, 79 N. C., 267. But under that statute many shares failed to be listed for taxation; besides, the shares of non-resident owners, except those of national banks, escaped taxation in this State under the ruling in North Carolina Co. *vs.* Commissioners of Alamance, 91 N. C., 454. To remedy this, the provision was passed which is section 14 of chapter 296, Acts 1893, and which requires the list of shares to be given in by the proper officer of the corporation, which shall pay the same in behalf of the shareholders. This does not affect the liability of the shares to tax as the property of the shareholders, but is simply for the convenience of the State in collecting the tax. The effect is merely to change the situs of the shares for taxation from the residence of the owner to the locality where the chief office of the corporation is situated, as was held in Wiley *vs.* Commissioner, 111 N. C., 397. It simply extends to the collection of taxes due by shareholders in other corporations the mode of collection already in force as to shareholders in national banks. Rev. St. U. S., § 5219. From this summary it will be seen that the State is within its taxing power in the provisions of chapter 296 of the Acts of 1893. It levies (1) a tax upon the real and personal property of corporations; (2)

upon the shares which are the personal property of the shareholders, but requires them to be listed and collected through the agency of the corporation; (3) it levies no tax upon franchises and dividends; (4) it does not tax the entire capital stock, but only the excess of its total value above the value of the real and personal property which the corporation lists for taxation. The capital stock belongs to the corporation. The shares or certificates of stock are entirely a different matter. They belong to the shareholders individually, and, under the constitution, must be taxed *ad valorem*, like other 'property belonging to the holder, independently of the taxation upon the corporation, its franchises,' etc. Smith, C. J., in *Belo vs. Commissioners*, 82 N. C., on page 419, citing *Cooley Const. Lim.*, 169, and *Field, Corp.*, 521, etc. He further says that the relation of stockholders to the corporation 'is very analogous to that of a creditor toward his debtor. * * * The latter must bear the taxation imposed upon its property and this may diminish its distributable profits; but the stockholder cannot, any more than the creditor, claim exemption on this account for his stock as distinct and separate property in his own hand.' 82 N. C., 420. To tax only the real and personal property of the corporation would leave, as we have said, untaxed that large part of its capital stock which represents its good will, its trade-mark, the profitableness of its business, all of which are property, as much protected by the laws, and as capable of being turned into money, as the real and personal property which the corporation owns. To tax the whole of the capital stock, in addition to the tax upon the real and personal property, would be, to the extent of the tax on the latter, double taxation, of the same kind as a tax on mortgaged property and a tax at the same time on the mortgagor's notes in the hand of the mortgagee; but there is nothing in either case to restrict the legislative power to so decree. Here, however, there is no double tax, but simply a tax on so much of the real and personal property of the corporation as is located in this State,

and a tax on the value of its capital stock in excess of the amount of realty and personalty which is listed for taxation here."

After having thus indicated the power of the legislature to levy a tax such as the one in the instant case upon the shares of stock in the aggregate, the nomenclature is then discussed in the following language:

"The tax on the shares is a separate matter, and is a tax on the shareholders on their property, whether they reside in or out of the State, collected through the medium of a quasi-statutory garnishment on the corporation. 'It has long been the common, if not the only, mode in many States. * * * and indeed is the only mode to collect taxes on shares of stockholders.' *Bank vs. Com.*, 9 Wall., 206; 2 *Thomp. Corp.*, #2849."

This case is on all fours with the one at bar. It clearly emphasizes the distinction between a tax levied upon the capital stock of the corporation and a tax levied upon the total aggregate shares of stock owned by the individuals. In applying the statute similar to section 2110, Compiled Laws of 1913, the North Carolina court treats the expression "capital stock" there used as meaning the total aggregate shares of stock, and the tax there imposed as being one, not upon the capital stock or property of the corporation, but upon the aggregate individual shares of the shareholders and construes the statute as taxing those shares at their source.

(a) *Cases distinguished.*

It is urged by the plaintiff in error that this court has in *Delaware vs. Pennsylvania*, previously cited, announced a rule contradictory to an interpretation as is here suggested for section 2110, Compiled Laws of North Dakota of 1913. Such an interpretation of the *Pennsylvania* case, however, misapprehends the limitation contained in the language

of the case itself. This court was then dealing with a tax imposed upon the capital stock of the corporation, and had no reference to a tax similar to the one in question imposed upon the aggregate shares of stock. Great care was used to make this distinction and limitation clearly evident. The Pennsylvania case deals only with the property of the corporation and specifically limits its application to this kind of taxation. It has nothing to do with the tax upon the individual shares of the shareholders. That such a distinction is made in the Delaware *vs.* Pennsylvania case is evident from the following excerpt taken therefrom:

"Of course, the distinction between the capital stock of a corporation, and the shares into which it may be ... and held by individual shareholders, is borne in mind and recognized, and nothing herein affects that distinction. The question here is simply as to the value of the capital stock with reference to the assessment and taxation upon the corporation itself which issues it, and has nothing to do with the individual shareholders." Delaware, L. &c., R. R. Co. *vs.* Pennsylvania, 198 U. S., 341-354.

In the later case of Hawley *vs.* Malden, 232 U. S., 1, the court recognizes the distinction here contended for as one not inconsistent with and being in no way affected by the case of Delaware *vs.* Pennsylvania, cited. For in the Malden case the rule is announced that shares of stock of a foreign corporation may be taxed in the hands of the shareholders and by its express language affirms the principle that the State creating the corporation may, by its laws, provide for the taxation of the shares of stock of the corporation at their source, whether owned by residents or non-residents, and regardless of where the corporate property may be located. In that case, through Mr. Justice Hughes, it is said by the court:

"It is well settled that the property of the shareholders in their respective shares is distinct from the

corporate property, franchises and capital stock, and may be separately taxed (*Van Allen vs. Assessors*, 3 Wall., 573, 584; *Farrington vs. Tennessee*, 95 U. S., 679, 687; *Tennessee vs. Whitworth*, 117 U. S., 129, 136, 137; *New Orleans vs. Houston*, 119 U. S., 265, 177); and the rulings in the State cases which we have cited proceed upon the view that shares are personal property and, having no situs elsewhere, are taxable by the State of the owner's domicile, whether the corporations be foreign or domestic."

And to this statement, by way of explanation, the court adds in the same case:

"Undoubtedly, the State in which a corporation is organized may provide, in creating it, for the taxation in that State of all its shares whether owned by residents or non-residents. *Corry vs. Baltimore*, 196 U. S., 466. This is by virtue of the authority of the creating State to determine the basis of organization and the liabilities of shareholders."

From a consideration of the cases of *Delaware, L. & C. R. Co. vs. Pennsylvania*, 198 U. S., 345; 49 L. Ed., 1077, and *Hawley vs. Malden*, 232 U. S., 1; 58 L. Ed., 477, it is apparent that no controversy or inconsistencies, in the decisions of this court, exist between the rules announced in those cases and the interpretation made by other courts of statutes similar to or identical with section 2110, Compiled laws of North Dakota for 1913.

It is evident that all of the decisions of this court bearing upon this question have clearly recognized the line of demarkation between a tax levied upon the corporation or against its capital stock and upon the aggregate shares of stock owned by the individual.

It is upon this distinction that the case of *Harvester Building Company vs. Hartley*, cited, and the case of *Commissioners of Durham County vs. Blackwell Durham Tobacco Company*, cited, and other interpretations of similar statutes rest their decision. They do not violate the rule announced

by this court in *Delaware vs. Pennsylvania*, for that case prohibited a tax upon the property of the corporation without first deducting those tangible assets outside the jurisdiction of the taxing sovereignty. The *Harvester Building Company vs. Hartley* case and the *Commissioners vs. Blackwell Durham Tobacco Co.* case and similar adjudications do not interpret statutes similar to section 2110, Compiled Laws of North Dakota for 1913, under consideration, as levying a tax upon the property of the corporation, but rather, as in *Hawley vs. Malden*, 232 U. S., 1, cited, interpret the tax authorized under such a taxing statute to be levied upon the aggregate shares of the shareholders.

(6) State of Arkansas ex Rel. Attorney General vs. Bodcaw Lumber Company, 128 Ark., 505; 194 S. W., 692.

The most recent interpretation of a taxing statute similar to the one in question is found in the case of *State ex rel. Attorney General vs. Bodeaw Lumber Co.*, 128 Ark., 505; 194 S. W., 692, decided in 1917. This case is of special value because it clearly recognizes the distinctions already indicated based upon statutes and constitutional provisions identical with those of North Dakota in the case at bar. A meager statement of the *Bodeaw* case will make the remarkable similarity between it and the instant case at once apparent.

The property of the *Bodeaw Lumber Company* consisted of its capital stock, invested in real and personal property, situated both in the States of Arkansas and Louisiana. It had during the years for which the suit for delinquent tax was brought by the Attorney General failed to make return on any of its property for taxation, except the tangible property situated in the State of Arkansas. Its principal place of business was at Stamps, in Arkansas. A review of the constitutional provisions and statutes in Arkansas relating to the controversy discloses that there existed:

1. A constitutional provision which required all property to be taxed by uniform rule. (Const. 1874, Art. 16, Secs. 5, 6, 7.)

2. A statute which declared stock in corporations to be personal property. (Kir. Dig., Secs. 6972, 6873, *et seq.*, 853.)

3. A statute which relieved any person from including in his assessment any shares of stock held by him in corporations, required to list their property for taxation. (Kir. Dig., Sec. 6902.)

4. A statute which required the corporation, through its president or authorized agent, like natural persons, to list its property according to schedule, specifying the number or amount and value of each article. (Kir. Dig., Secs. 6872, 6899, and 6910.)

5. A statute under which the assessment was made which required an additional special schedule containing a "sworn statement of the capital stock," setting forth:

(a) The name and location of the company or association.

(b) The amount of capital stock authorized and the number of shares into which such capital stock is divided.

(c) The amount of capital stock paid up, its market value, and if no market value, then the actual value of the shares of stock.

(d) The total amount of all the indebtedness except the indebtedness for current expenses, excluding from such indebtedness the amount paid for the purchase of the property.

(e) The true valuation of all tangible property belonging to such company or corporation. (Kir. Dig., Sec. 6936, as amended by act March 11, 1913, at page 615.)

It will be noticed that all of these sections are paralleled for interpretation in the case under consideration. The corporation through its officers returned the ordinary list, but failed to furnish the special schedule required by subdivision (5) above. The Bodcaw Lumber Company failed during the years in question to make any return on its capital stock, and it was contended by the State that such capital stock, in the language of the court:

"* * * is subject to taxation here without deduction of the value of property outside of this State which goes to make up the value of the stock. On the other hand, the contention of counsel for the defendant corporation is that only the tangible property of the corporation in the State is subject to taxation here and that the taxation of the capital stock, without deduction of the value of the tangible property outside of the State would be tantamount to indirectly taxing the property itself and would constitute double taxation."

It will thus be seen that the direct question involved depended upon the meaning of the words "capital stock," under precisely the same circumstances as it is found in section 2110, Compiled Laws of North Dakota for 1913. In its opinion, rendered by Chief Justice McCullough, the Arkansas court quoted a statute, Sec. 6137, similar to the latter portion of section 2110, Compiled Laws of North Dakota for 1913, which required of the assessor, upon the failure of the officers of the corporation, to return the report required by Secs. 3936 and 3937, summarized in subdivision 5 above, that he, from the best information obtainable, make out and enter upon the proper assessment-roll a list, with the value of all tangible and intangible property belonging to such defaulting corporation.

The court then continued:

"Now the provision just quoted with reference to the method of assessment of corporation property must be read in connection with the statute already

referred to, which provides that the owners of shares of stock in a corporation required to list its capital stock are not required to include such shares of stock in their personal assessments, and, when thus considered, it is seen that the legislative scheme provided is not merely to assess the property of the corporation itself, but to include the value of the shares of stock and tax them at the source. *The words 'capital stock' used in the statute means the aggregate value of the shares of stock in the hands of the shareholders, though the values of the shares of stock themselves, do not constitute the limit of taxation.* The purpose of the law-makers was to merge the separate valuation of the shares of stock into the aggregate valuations of the whole, and thus constitute the compound as a basis for fixing the valuation for taxation purposes, after deducting the value of the tangible property which is to be specifically assessed separately. *In this way the law-makers have provided a scheme for taxation of all of the elements of value of this property one time, and only once, and the tax is levied at the source and paid there without any assessment being levied against the individual shareholders.* The scheme absolutely excludes any idea of double taxation, but it does provide an adequate means of including all the elements of value contained in the shares of stock and the tangible property of the corporation itself, merged into a composite whole. The assessment of the property is in name only against the corporation, for it includes the elements that go to make up the value of the shares of stock themselves. The assessment does not include both the shares of stock separately and the aggregate whole as represented by the capital of the corporation, for that would be double taxation, but the scheme does, as before stated, contemplate that all of the elements of value be considered in fixing a basis of value which will include every species of property involved." (Italics are ours.)

The court then proceeded to differentiate between the two kinds of property, namely, the shares of stock held separately

as between the property of the corporation itself. In drawing this distinction already referred to in the case of *Commissioners vs. Blackwell Durham Tobacco Company*, *supra*, the court said:

"The two species of property, that is to say the shares of stock held separately in the hands of the shareholders and the property of the corporation itself, do not contain the same elements of value. The capital of the corporation is represented by its tangible assets; whereas, the shares of stock contain only the element of market value, which may be increased or decreased by the value of the earning capacity of the corporation above or below the market value of the property owned by the corporation. The statute expressly provides that intangible as well as tangible values shall be taxed, and shares of stock represent the taxable intangible value, subject to reduction to the extent of the value of the tangible property in the State which is taxed separately. If the State should get no benefit whatever from the element of value represented by the earning capacity of the corporation and nothing in return would be received in the way of taxes for omitting from taxation the shares of stock in the hands of individual holders, thus creating a complete exemption of that class of property."

The court then proceeded to outline the method by which deduction of tangible property is made from the value of the shares of stock. The court takes the accepted view that for the purpose of taxing the shares of stock in the aggregate, in order to evade double taxation, all that is necessary is that the tangible property owned by the corporation within the jurisdiction levying the tax be deducted therefrom. The prohibition against double taxation does not require that the State deduct from the shares of stock upon which the levy is made property held by the corporation in foreign jurisdictions, and such an application of the statute in question is made by the court in the following language:

"So when these different elements are considered together, we have a taxation scheme which embraces them all in making up the true valuation for assessment purposes. Such being the State of the law with respect to the method of assessment and the elements to be considered, the question arises whether or not there should be a deduction of tangible property outside of the State, over which the State has no jurisdiction and which is taxed elsewhere. Our statute expressly provides that tangible property of the corporation shall be assessed separately, but this does not include, of course, the assessment of property outside of the boundaries of the State, for the power does not extend that far. But it does not necessarily follow that because the property owned by the corporation is in another State and is taxed there, that its value must be deducted from the blended valuations which are assessed for taxation in this State. That construction would lead to a partial exemption of the shares of stock from taxation, and we cannot presume that the legislative scheme contemplates such a thing, for it is contrary to an express provision of the Constitution, which prohibits exemptions from taxations. *Dallas Co. vs. Home Fire Ins. Co., supra*. The statute hereinbefore quoted which authorizes the omission from the personal assessment lists of shares of stock in a corporation is limited to such corporations as are required to list their property for taxation, and if it be held that the property of the corporation outside of the State is not to be listed, it would necessarily follow that the shares of stock themselves must be separately listed and taxed against the owners thereof. Such was obviously not the intention of the framers of the statute, even though the tangible property is situated beyond the limits of the State, for there is no provision for an assessment of the shares of stock against the owner in the cases where the corporation itself assesses its property partly in this State and partly in some other State. The State undoubtedly has a right to assess all the property of the corporation and its shareholders in this State and to consider all the elements of

value in levying the assessments. It does not attempt to assess the property outside of the State, either directly or indirectly, nor does it attempt to assess the capital of the corporation as represented by the value of property outside of this State, but what it has attempted to do in the statute hereinbefore outlined is to introduce into the assessment the elements of value attaching to the shares of stock themselves, even though it may be based on property of the corporation situated outside of the State, and thus 'to require one tax on all attainable sources of value.' "

In the Bodeaw case it was contended, as it has been suggested by the plaintiff in error in this case, that the interpretation here urged by the defendant in error is in violation of principles already announced by this court. In discussing those decisions, and in harmonizing its interpretation of the statute in question with those decisions, the opinion of the Arkansas court continues:

"This view of the statute prescribing the method of taxation reconciles the assessment without such deduction with those decisions of the United States Supreme Court, which hold that the assessment of the property of a corporation cannot include property outside of the State, and also with those which hold that the shares of stock themselves can be assessed, even though property which goes to make up the value thereof is situated beyond the borders of the State. *Delaware, L. & W. Rd. Co. vs. Pennsylvania*, 198 U. S., 341; *Hawley vs. Malden*, *supra*.

"Learned counsel for the defendant earnestly rely on the decision of the Supreme Court of the United States in the first of the two cases just cited as sustaining their contention that this is in effect an attempt to indirectly tax tangible property outside of this State by including it in the assessment of the capital stock of the corporation. There is language found in that opinion which seems to bear out that contention. The court say:

"We cannot see the distinction, so far as the question now before the court is concerned, between a tax

assessed upon property *eo nomine* or specifically when outside the State, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the State, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of the capital stock or anything else which represents that property. Such a tax, in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock.

"It must be remembered that the above statement of the law was made in a case reviewing an assessment which did not contain the element of value going to make up the shares of stock of a corporation, but it related purely to an assessment of the capital as the property of the corporation itself. It does not appear that in the State of Pennsylvania, where the case arose, there was a statute such as we have here, requiring the corporation itself to return the value of the shares of stock and exempting individual stockholders from taxation. But on the contrary, it appears from the opinion that the assessment provided under the laws of Pennsylvania, constituted one against the property of the corporation itself, and, for aught that appears in the opinion referred to, the shares themselves were otherwise taxed.

"The statute which we deal with in the present case contemplates an assessment of the shares of stock themselves, or at least the separate elements of value which they represent, and the State has a right to impose the assessment at their value without deduction of property outside the State. In other words, there is a clear distinction between an assessment solely of the corporation property and a composite assessment such as is provided under our statutes for

the taking into consideration of all of the elements of value, including the shares of stock therein. The Supreme Court of the United States so held in the case of *Commercial Bank vs. Chambers*, 182 U. S., 556, and the force of the decision is not impaired by the later case cited above. The statute, and the assessment which the State attempts now to make thereunder, is not an invasion of the rule against double taxation, as the court indicates was attempted under the Pennsylvania statute, but it constitutes merely an attempt to assess the valuation of property in this State, and tax it only one time according to its true elements of value. In considering the validity of the taxation scheme, we look to the effect and to the result sought to be accomplished, rather than to the mere form or to the use of the name in designating the method of taxation, and when this is done we discover the intention of the lawmakers to tax in the name of the corporation the shares of stock themselves, without deduction, as is our right, of the valuation of property outside of the State, which goes to make up the valuation of the shares of stock. The statute provides for a separate taxation of the tangible property of the corporation in the State, and the valuation of the property thus separately assessed must be deducted from the total valuation assessed against the corporation. *Hempstead County vs. Hempstead County Bank*, 73 Ark., 515; *Harris Lumber Co. vs. Grandstaff*, 78 Ark., 187; *Arkadelphia Milling Co. vs. Board of Equalization*, 126 Ark., 611; *Harvester Building Co. vs. Hartley*, 160 Pac. (Kan.), 971. The deduction, however, can only be of the property in this State which is assessed here, for the sole object of the deduction is to prevent double taxation. *Hempstead County vs. Hempstead County Bank*, *supra*. It should not include property outside of the State, for that is not taxed here. Upon other principles hereinbefore indicated, the valuation of the property outside of the State must be omitted when the property of the corporation itself is sought to be taxed, but when the effort is to assess the values of the shares of stock, it should not be deducted, for those shares of stock have a separate valuation here within the

jurisdiction of the State and upon which the State has a right to take its toll of taxation.

"Our conclusion, therefore, is that the State is correct in its contention that the failure of the defendant corporation to make return of its capital stock without deduction of the value of tangible property outside of the State was a violation of its duty, and that the property was and is subject to taxation."

Justice Wood, for thirty years a member of the Arkansas court, filed a concurring opinion. He agreed entirely with the view outlined above, and his opinion removes any obscurity which may be found in the views of the court already expressed. Quoting from Justice Wood's concurring opinion:

"The present suit was brought under the above statute, and, treating the same as a valid law, there is no escape from the conclusion that under our taxing system corporations of the character of the appellee are required to return for taxation the shares of stock into which the capital stock is divided, and these shares, for the purpose of taxation, are treated as capital stock of the corporation. The shares of stock are not taxed as the property of the shareholders but, under our statute, they are taxed under the designation 'capital stock,' and as the property of the corporation. As the shareholders are not required to tax their individual shares separately, the corporation is required to tax them in the aggregate under the head of 'capital stock.' *Dallas Co. vs. Banks*, 87 Ark., 484; *Dallas Co. vs. Home Fire Ins. Co.*, 97 Ark., 254.

"The assets of the corporation of every character and wherever located may be taken into consideration by the assessing officer in ascertaining the value of the shares of stock. The situs of the shares of stock—capital stock—for the purpose of taxation, is the domicile of the corporation. The value of tangible property owned by the corporation beyond the jurisdiction of the State must be taken into consideration in determining the value of the shares of stock,

for such property is one of the elements or factors giving value to the shares of stock, and the value of such property in so far as it enters into the calculation or estimate made in determining the value of the shares of stock in the aggregate cannot be deducted from the sum thus ascertained to be the value of those shares, for this would be but climbing the hill and sliding back to the starting point. It would be tantamount to excluding the tangible assets of the corporation in other jurisdictions from consideration in the calculation necessary to determine the aggregate value of the shares of stock. It is not double taxation to adopt this plan for ascertaining the value of the shares of stock, or capital stock, for the reason that only the value of the shares of stock so ascertained is taxed in this State. The tangible property of the corporation outside of the State is not taxed here at all, and could not be, for that is taxed in the jurisdiction where it is located. But such property is only considered in so far as it contributes to give value to the shares of stock, which the State has a right to tax, at their source, that is, the domicile of the corporation. But the rule is different as to tangible property within the State. The State has the right to tax the value of the shares of capital stock once, as ascertained by the method indicated, and, inasmuch as the tangible assets within the State have been considered once in making up this value, the rule adopted by this court to prevent double taxation is to deduct the tangible property here taxed as such, from the aggregate value of the shares of stock taxed as capital stock because that has to be considered and is embraced in the calculation making up the total value of the shares of stock. Not to deduct the local tangible assets, taxed as such, would be equivalent to taxing the value of such assets twice. But all of this is clearly set forth and argued in the opinion of the Chief Justice."

Little can be said by way of argument to re-enforce the position taken by the Kansas court in the case of *Harvester Building Company vs. Hartley*, cited, or the North Carolina

court in the case of *Commissioners vs. Blackwell Durham Tobacco Company*, cited, or the Arkansas court in the case of *State vs. Bodeaw Lumber Company*, cited, all of which proceeded upon the same theory, namely, that a tax such as the one provided for in section 2110, Compiled Laws of North Dakota for 1913, is a levy made upon the aggregate shares of the corporation or the property of the shareholders. The opinions in each one of those cases contain the argument of the defendant in error in this case, and they are unanswerable. They are clear and unequivocal on the point that where shares of stock listed by the corporation have been exempted from taxation, in the hands of the individual shareholders, and a tax has been levied against the corporation for the value of those shares, such as has been done by section 2110, Compiled Laws of North Dakota for 1913, each tax is a garnishment against the corporation for the tax on the shares owned by the shareholders and is not a tax upon the capital stock or property of the corporation.

(7) Conclusion.

It has been the position taken by the plaintiff in error in this case that the tax levied under authority of section 2110, Compiled Laws of North Dakota for 1913, is a property tax, and that being levied against the corporation chartered in this State upon its intangible property, it takes the property of the plaintiff in error without due process of law, and consequently exceeds the taxing jurisdiction of the State of North Dakota.

From the foregoing discussion it is apparent that, taking the interpretation of the statute as contended for by the plaintiff in error, it is immaterial what name is given the tax in question. It is a tax levied against all of the property of the corporation except that specifically exempted and otherwise taxed. Not only from the authorities, but as well from the nature of the business conducted by the plaintiff

in error, it appears that such a tax so levied is eminently warranted. This conclusion is the only one made and authorized by the law, on which the plaintiff in error has elected to stand.

Aside, however, from the proposition contended for by the plaintiff in error it is evident that this appeal is being prosecuted upon an incorrect understanding of the nature of the tax. Section 2110, Compiled Laws of North Dakota for 1913, has application to, and makes its levy upon, the shares of stock in the aggregate of domestic corporations. Under the terms of its own language and under the interpretations made of similar statutes, by other courts, it has no reference to the capital stock or corporate property of the corporation itself. The adjudications of this court beyond question permit the State to establish the taxing situs of shares of stock in domestic corporations. This is exactly what section 2110, Compiled Laws of North Dakota for 1913, seeks to accomplish. It violates in no single particular section 1 of article 14 of the amendments to the Constitution of the United States.

The judgment herein complained of should be affirmed in all things.

WILLIAM LANGER,
Attorney General.
ALBERT E. SHEETS, JR.,
Assistant Attorney General.

GEO. E. WALLACE,
Of Counsel.

APPENDIX.**I.***Section 176 of the Constitution of North Dakota.*

Laws shall be passed taxing by uniform rule all property according to its true value in money, but the property of the United States and the State, county and municipal corporations, both real and personal, shall be exempt from taxation; and the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery or charitable purposes and personal property to any amount not exceeding in value two hundred dollars for each individual liable to taxation; but the legislative assembly may, by law, provide for the payment of a per centum of gross earnings of railroad companies to be paid in lieu of all State, county, township and school taxes on property exclusively used in and about the prosecution of the business of such companies as common carriers, but no real estate of said corporation shall be exempted from taxation in the same manner, and on the same basis as other real estate is taxed, except roadbed, right-of-way, shops and buildings used exclusively in their business as common carriers, and whenever and so long as such law providing for the payment of a per centum on earnings shall be in force, that part of section 179 of this article relating to assessment of railroad property shall cease to be in force.

II.*Section 2077, Compiled Laws of North Dakota, 1913.*

Personal property includes all goods, chattels, moneys, credits and effects wheresoever they may be;

all ships, boats and vessels, whether at home or abroad, and all capital invested therein; all moneys and interest, whether within or without the State, due the person to be taxed, and all other debts due such persons; all public stocks and securities; all stock in turnpikes, railroads, canals and other corporations, except national banks out of the State, owned by the inhabitants of this State; all personal estate of moneyed corporations, whether the owner thereof resides in or out of the State, and the income of any annuity, unless the capital of such annuity be taxed within the State; all shares of stock in any bank organized, or that may be organized, under any law of the United States, or of this State; and all improvements made by persons upon lands held by them under the laws of the United States, and all such improvements upon lands, the title to which is still vested in any railway company, and which is not used exclusively for railroad purposes, and the improvements of any other corporation whose property is not subject to the same mode and rule of taxation as other property.

III.

Section 2102, Compiled Laws of North Dakota for 1913.

List of Personal Property to be Made under Oath.—Every person required by this chapter to list property shall, when called upon by the assessor, make out and deliver to the assessor a statement verified by oath, of all the personal property in his possession or under his control, and which by the provisions of this chapter he is required to list for taxation, either as an owner or holder thereof, or as guardian, parent, husband, trustee, executor, administrator, receiver, accounting officer, partner, agent or

factor; but no person shall be required to include in his statement any share or portion of the capital stock or property of any company or corporation which such company or corporation is required to list or return as its capital or property for taxation in this State.

IV.

Section 2094, Compiled Laws of North Dakota for 1913.

Manner of Listing Personal Property.—Personal property shall be listed in the manner following:

1. Every person of full age and sound mind, being a resident of this State, shall list all his moneys, credits, bonds or stock shares, or stock of joint or other companies (when the property of such company is not assessed in this State), moneys loaned or invested, annuities, franchises, royalties and other personal property.

2. He shall also list separately and in the name of his principal all moneys and other personal property invested, loaned or otherwise controlled by him as the agent or attorney, or on account of any other persons, company or corporation whatsoever; and all money deposited subject to his order, draft, or check, and credits due from or owing to any person or persons, body corporate or politic.

3. The property of a minor child shall be listed by his guardian or by the person having such property in charge.

4. The property of an idiot or lunatic, by the person having charge of such property.

5. The property of a person for whose benefit it is held in trust, by the trustee; of the estate of a deceased person, by the executor or administrator.

6. The property of persons or corporations whose assets are in the hands of receivers, by such receivers.

7. The property of a body politic or corporate, by the president, agent or officer thereof.

8. The property of a firm or company, by a partner or agent thereof.

9. The property of manufacturers and others in the care of an agent, by such agent in the name of his principal, as merchandise.

10. Personal property shall be listed and assessed annually with reference to its value on the first day of April.

V.

Section 2103. Compiled Laws of North Dakota 1913.

Value to be Fixed by Assessor. Items of List.—It shall be the duty of the assessor to determine and fix the true and full value of all items of personal property included in such statement, and enter the same opposite such items respectively, so that, when completed, such statement shall truly and distinctly set forth:

1. The number of horses one year old, two years old, three years old, and over and separately the number of stallions kept for service, with the value thereof, in separate classes.

2. The number of cattle one year old, two years old, the number of cows three years old, and over; the number of work oxen, and the number of all other cattle three years old and over, and the value thereof, in the separate classes.

3. The number of mules and asses one year old, two years old, three years old and over, and the value thereof, in the separate classes.

4. The number of sheep and value thereof.

5. The number of hogs and the value thereof.

6. The number of sleighs, sleds, wagons, carriages, and all wheeled vehicles of whatsoever kind, including bicycles and the value thereof.

7. The number of melodeons and organs and the value thereof.

8. The number of pianofortes and value thereof.

9. The value of household furniture.

10. The value of agricultural tools, implements and machinery.

11. All threshing machines, engines, and boilers, and the value thereof.

12. The value of gold and silver plate and plated ware.

13. The value of diamonds and jewelry.

14. The value and description of every franchise, annuity, royalty and patent right.

15. The value of every steamboat, sailing vessel, wharf boat, barge or other water craft.

16. The value of goods and merchandise which such person is required to list as a merchant.

17. The value of materials and manufactured articles which such person is required to list as a manufacturer.

18. The value of manufacturers' tools and implements and machinery, including engines and boilers.

19. The amount of moneys other than of banks, bankers, brokers or stock jobbers.

20. The amount of credits other than of banks, bankers, brokers and stock jobbers.

21. The amount and value of bonds and stocks, other than bank stock.

22. The number of shares of bank stock and the value thereof.

23. *The amount and value of shares of capital stock of companies and associations not incorporated by the laws of the State.*

24. The value of stock and furniture of sample rooms and eating houses, including billiard tables or other similar tables.

25. The value of all other articles of personal property not included in the preceding twenty-four items.

26. The value of all elevators, warehouses and granaries and of all grain contained in either thereof, wheresoever the same may be situated.

27. The value of all improvements, except plowing on lands held under the law of the United States, to which final certificates of entry have not issued, and on lands the title to which is vested in any railroad company.

VI.

Section 2110, Compiled Laws of North Dakota, 1913.

Property of Companies or Associations, How and by Whom Listed.—The president, secretary or principal accounting officer of any company or association, whether incorporated or unincorporated, except banking corporations whose taxation is especially provided for in this article, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

1. The name and location of the company and association.
2. The amount of capital stock authorized and the number of shares into which said capital stock is divided.
3. The amount of capital stock paid up.
4. The market value, or if they have no market value, then the actual value of the shares of stock.
5. The total amount of all indebtedness except the indebtedness of current expenses, excluding from such expense the amount paid for purchase or improvement of property.
6. The value of all real property, if any.
7. The value of its personal property.

The aggregate amount of the fifth, sixth and seventh items shall be deducted from the total amount of the fourth, and the remainder, if any, shall be listed as "bonds and stocks," under subdivision 23 of section 2103. The real and personal property of

each company or association shall be listed and assessed the same as other real and personal property. In all cases of failure or refusal of any person, officer, company or association, to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information he can obtain.

VII.

Section 4505, Compiled Laws of North Dakota, 1913.

Contents of Articles.—The articles of incorporation must set forth:

1. The name of the corporation.
2. The purpose for which it is formed.
3. The place where its principal business is to be transacted.
4. The term for which it is to exist.
5. The number of its directors or trustees and the names and residences of those who are to serve until their successors are elected and qualified.
6. If there is a capital stock, its amount and the number of shares into which it is divided.

APR 27 1920

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1919.

No. 302.

CREAM OF WHEAT COMPANY, *Plaintiff in Error*,
vs.
THE COUNTY OF GRAND FORKS, IN THE STATE OF
NORTH DAKOTA, *Defendant in Error*.

IN ERROR TO THE SUPREME COURT OF
NORTH DAKOTA.

**REPLY BRIEF IN BEHALF OF PLAINTIFF IN
ERROR.**

ROME G. BROWN,
ARNOLD L. GUESMER,
HARRY S. CARSON,
EDWIN C. BROWN,
Attorneys for Plaintiff in Error.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1919.

No. 302.

CREAM OF WHEAT COMPANY, *Plaintiff in Error,*
vs.
THE COUNTY OF GRAND FORKS, IN THE STATE OF
NORTH DAKOTA, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF
NORTH DAKOTA.

**REPLY BRIEF IN BEHALF OF PLAINTIFF IN
ERROR.**

Counsel for the defendant in error in their brief attempt to assert the claim that the statute in question should not be construed as imposing a property tax to the corporation on its property, and that the statute should be construed as imposing a tax to the shareholders on their shares of stock, the corporation being

the mere agent for the collection of the tax, and in connection with the claim so asserted counsel for the defendant in error cite three State Court Decisions, Harvester Building Company vs. Hartley, 98 Kan., 732, 99 Kan., 73; Durham County vs. Blackwell Durham Tobacco Company, 116 N. C., 441; and State v. Bodcaw Lumber Company, 128 Ark., 505.

That the statute in question must be construed as imposing a property tax to the corporation on its property and not a tax to the shareholders on their shares of stock is conclusively shown by the following decisions of this Court:

Home Savings Bank v. Des Moines, 205 U. S., 503.

Powers v. Detroit & Grand Haven Railway Company, 201 U. S., 543.

New Orleans v. Houston, 119 U. S., 265.

The decisions of this Court just cited, particularly the opinion of Mr. Justice Moody in Home Savings Bank v. Des Moines, 205 U. S., 503, where the entire subject is completely covered, are a complete refutation of the claim so asserted by the defendant in error, and the decisions just cited from this Court conclusively establish that the statute in question must be construed as imposing a property tax to the corporation on its property and not a tax to the shareholders on their shares of stock.

Respectfully submitted,

ROME G. BROWN,
ARNOLD L. GUESMER,
HARRY S. CARSON,
EDWIN C. BROWN,

Attorneys for Plaintiff in Error.